Volume 29 | Issue 1 Article 6

1984

Federal Statutes - Preemption - National Labor Relations Act and Employee Retirement Income Security Act Preempt State-Imposed Eligibility Requirements for Union Officials Representing Casino Employees

Andrew Bramnick

FEDERAL STATUTES—PREEMPTION—NATIONAL LABOR RELATIONS ACT AND EMPLOYEE RETIREMENT INCOME SECURITY ACT PREEMPT STATE-IMPOSED ELIGIBILITY REQUIREMENTS FOR UNION OFFICIALS REPRESENTING CASINO EMPLOYEES

Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danziger (3d Cir. 1983)

In 1978, the Hotel and Restaurant Employees and Bartenders International Union Local 54 (Union) filed its annual registration statement as required by New Jersey's Casino Control Act (Act).[1] Thereafter, the Division of Gaming Enforcement (Division)[2] reported to the Casino Control Commission (Commission)[3] that certain of the union's officers were disqualified under the licensee qualification provisions of the Act and requested that the Commission prevent the Union from collecting dues and administering the pension and welfare funds.[4]

---

1. Hotel and Restaurant Employees and Bartenders International Union, Local 54 v. Danziger, 709 F.2d 815, 819 (3d Cir.) (order granting preliminary injunction), *reh'g denied*, Nos. 82-5210, 82-5234, 82-5260 (June 30, 1983), *prob. juris. noted*, 104 S. Ct. 479 (1983). The Casino Control Act, N.J. STAT. ANN. § 5:12-1-5:12-152 (West Supp. 1983) authorizes the licensing for casino gambling of those hotels in Atlantic City which meet specific qualifications. 709 F.2d at 817. Under § 93 of the Act, all labor unions which seek to represent casino employees must be licensed and registered with the Casino Control Commission. N.J. STAT. ANN. § 5:12-93 (West Supp. 1983). For a discussion of the Casino Control Act, see notes 88-92 and accompanying text *infra*. For the text of the Act's registration requirements, see note 90 *infra*. The Union has approximately 12,000 members of whom over 8000 are employed as waiters, waitresses, bartenders, cooks, kitchen help, housekeepers, and other hotel service employees in the Atlantic City hotels and casinos. 709 F.2d at 817. The Union has been duly certified by the National Labor Relations Board (Board) pursuant to § 9 of the NLRA "as the representative of those employees for purposes of collective bargaining . . . [and] participates on behalf of its members in the Hotel and Restaurant Employees and Bartenders International Union Pension Fund, and its Health and Welfare Fund." 709 F.2d at 817. *See* 29 U.S.C. § 159 (1976).

2. *See* N.J. STAT. ANN. § 5:12-55 (West Supp. 1983). The Division is responsible for investigation and enforcement of the Act. N.J. STAT. ANN. §§ 5:12-76-5:12-79 (West Supp. 1983). For a discussion of the Division's authority, see note 89 and accompanying text *infra*.

3. *See* N.J. STAT. ANN. § 5:12-50 (West Supp. 1983). The Commission has broad regulatory authority over casino gambling. *Id.* §§ 5:12-63-5:12-75 (West Supp. 1983). For a discussion of the Commission's responsibilities, see notes 88-89 and accompanying text *infra*.

4. 709 F.2d at 819. The suspect officers included Frank Gerace, President; Robert Lumino, Secretary-Treasurer; and Frank Materio, Grievance Manager. *Id.* For a discussion of the Act's licensee qualification provisions, see notes 91-92 and accompanying text *infra*.

Before the Commission could hold disqualification hearings,[5] the Union filed suit in the United States District Court for the District of New Jersey, alleging that the qualification provisions of the Act were preempted by the National Labor Relations Act (NLRA)[6] and the Employee Retirement Income Security Act (ERISA).[7] An amended complaint further alleged that the questioned sections were also preempted by the Labor Management Reporting and Disclosure Act (LMRDA).[8]

The district court denied the Union's motions for a preliminary injunction[9] and an injunction pending appeal.[10] The Commission then went for-

5. 709 F.2d at 819. For a discussion of the Commission's duties regarding license applications, see note 89 and accompanying text *infra*. Before filing suit in the district court, the Union, at a preliminary conference raised objections to the constitutionality of the qualification provisions. 709 F.2d at 819. The Commission ruled that since it was not a court, it lacked competence to consider the objections. *Id.* The Commission then set September 9, 1981 as the date for an evidentiary hearing on disqualification. *Id.* The Union filed its complaint in district court on August 17, 1981. *Id.*

6. *Id. See* 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981). For a discussion of the NLRA, see notes 20-22 & 25-29 and accompanying text *infra*.

7. 709 F.2d at 819. *See* 29 U.S.C. §§ 1001-1381 (1976 & Supp. V 1981). The Employee Retirement Income Security Act regulates employee health, welfare and pension plans which are "established or maintained by an employer or by an employee organization, or by both . . . ." *Id.* § 1002(1). For a discussion of ERISA, see notes 23 & 30-31 and accompanying text *infra*.

8. 709 F.2d at 819. *See* 29 U.S.C. §§ 401-531 (1976). For a discussion of the LMRDA, see notes 25-29 and accompanying text *infra*. The complaint also alleged that the career criminal provision of the Act was both overbroad and vague in violation of the first, fifth, and fourteenth amendments of the Constitution. 709 F.2d at 819. The Union requested a declaratory judgment pronouncing the qualification provisions invalid and also sought preliminary and permanent injunctions against the enforcement of the relevant sections. *Id.* The Union claimed that the qualification provisions conflicted with federal labor relations statutes and that "[t]he possibility that Local 54 will be prevented from collecting dues and administering pension, health and welfare funds . . . create[s] a direct impediment to effectuation of the rights of self-organization guaranteed to employees by Section 7 of the National Labor Relations Act . . . ." Hotel and Restaurant Employees, Local 54 v. Danzinger [sic], 536 F. Supp. 317, 326 (D.N.J. 1982) (order denying preliminary injunction), *rev'd and remanded*, 709 F.2d 815 (3d Cir.), *prob. juris. noted*, 104 S. Ct. 479 (1983).

9. 536 F. Supp. at 326-38. In denying the motion for preliminary injunction, the court held that the Union "was not likely to succeed on the merits of their claim that the Casino Control Act is preempted by the LMRDA." *Id.* at 328. The district court reasoned that since the LMRDA expressly specified when state law is to be excluded from contemporaneous application, and since these provisions were not applicable to the Union's claims, the LMRDA did not preempt the New Jersey Casino Control Act. *Id.* at 327-28 (citing DeVeau v. Braisted, 363 U.S. 144 (1960)). In addition, the district court held that since the enforcement of the qualification provision was within the discretion of the Commission, there was no conflict with the NLRA or ERISA. 536 F. Supp. at 326-31. The court assumed that the Commission would use its discretion to avoid a conflict with federal law. *Id.* at 331. For the text of the provisions of the Act which grant the Commission discretionary enforcement power, see note 88 *infra*.

10. 709 F.2d at 820; 536 F. Supp. at 342-44. After the denial of the preliminary injunction, the Union applied for an injunction pending appeal. 709 F.2d at 820. *See* FED. R. APP. P. 8(a). The application was initially denied by the district court and

ward with the disqualification hearing, concluding that several Union officials were disqualified and that the Union should be barred from collecting membership dues and administering the health and welfare funds.[11] The district court subsequently enjoined the Commission, pending appeal, from taking any steps to enforce its decision.[12] On appeal from the district court's denial of a preliminary injunction,[13] the United States Court of Appeals for the Third Circuit[14] reversed, *holding*, *inter alia*,[15] that the disqualifi-

by the Third Circuit. 709 F.2d at 820. As a result, the Commission proceeded with its hearings. *Id.* The Union moved for reconsideration by the district court regarding an injunction pending its appeal. *Id. See* FED. R. CIV. P. 62(c). The district court then granted the Union's motion enjoining enforcement of the Commission's order, which was to expire on the entry of a judgment disposing of the Union's appeal. 709 F.2d at 821.

11. 709 F.2d at 820-21. The Commission disqualified President Frank Gerace, Executive Board member Frank Materio, and Business Agent Karlos LaSane under § 86 of the Act. *Id.* Gerace and Materio were disqualified under § 86(f) due to their association with members of organized crime. *Id.* at 820. LaSane was disqualified under § 26(c) because of a 1973 extortion conviction. *Id.* at 821. For a discussion of the Act's disqualification criteria, see notes 90-92 and accompanying text *infra*.

12. 709 F.2d at 821. For a discussion of the relevant enforcement procedures, see notes 88-92 *infra*. The district court enjoined the Commission from taking any steps to enforce § 92 or its disqualification decision. 709 F.2d at 821. The district court's order did not prohibit the Commission from issuing an opinion regarding the disqualification provisions with respect to the Union's administration of the health and welfare funds. *Id.* The Commission issued its opinion holding that the dues collection prohibition and the welfare fund prohibition could be applied singly or jointly. *Id.* In this case, the Commission stated that it would invoke only the dues collection prohibition. *Id.* (footnote omitted). For a discussion of the § 93 provisions prohibiting the collection of dues and the administration of welfare funds, see notes 91-92 and accompanying text *infra*.

13. *Id.* at 831. On appeal, the Union did not argue that the LMRDA preempted the Act, but only that the NLRA and ERISA preempted the Act's disqualification provisions. *Id.* at 843 n.10 (Becker, J., concurring in part and dissenting in part).

14. The case was heard before Circuit Judges Gibbons, Higgenbotham, and Becker. Judge Gibbons wrote the court's opinion. Judge Becker filed an opinion concurring in part and dissenting in part.

15. 709 F.2d at 821-33. In addition to its holding that section 7 of the NLRA and ERISA preempt the New Jersey Casino Control Act, the Third Circuit dismissed, for lack of jurisdiction, the cross-appeals of the Commission and the Division. *Id.* These appellants had argued that under 28 U.S.C. § 1292(a)(1) " 'an appeal from an injunctive order supports review of an order denying a motion to dismiss for failure to state a cause of action, for improper venue, for lack of jurisdiction, and for lack of standing.' " *Id.* at 821 (citing 9 J. MOORE & B. WARD, MOORE'S FEDERAL PRACTICE ¶ 110.25, at 271 (1983)). The court rejected this argument, reasoning that since the Division and the Commission were the prevailing parties in the district court, they were not aggrieved by the denial of the preliminary injunction. *Id.* Moreover, the court argued that no order had been issued on these motions since the district court had only discussed them in its opinion and that "appeals do not ordinarily lie from opinions." *Id.* at 821 (citing FED. R. CIV. P. 54(a), 58). Finally, the court stated that even if the opinion were treated as an order, the rule in the Third Circuit was that "it would not be reviewable in conjunction with an appeal from even the grant of a preliminary injunction." *Id.* (citing Kershner v. Mazurkiewicz, 670 F.2d 440 (3d Cir. 1982)).

Further, the court held that the district court had erred in failing to grant the

cation provisions of the New Jersey Casino Control Act are preempted by section 7 of the National Labor Relations Act and by the Employee Retirement Income Security Act. *Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danziger*, 709 F.2d 815 (3d Cir.), *prob. juris. noted*, 104 S. Ct. 479 (1983).

Both the NLRA[16] and ERISA[17] confer on employees certain rights and protections[18] in areas of industrial relations having a significant impact on interstate commerce.[19] The NLRA consists of three separately-enacted statutes and amendments thereto which constitute the primary body of federal law controlling labor-management relations in private industry.[20] The

---

Union's request for preliminary injunctive relief against the pending Commission proceeding, but affirmed the district court's decision not to abstain from hearing the case. *Id.* at 831-33. For a discussion of these holdings, see notes 125-30 and accompanying text *infra*.

16. 29 U.S.C. §§ 151-169 (1976 & Supp. V 1981). For a discussion of the NLRA, see notes 20-22 & 25-29 and accompanying text *infra*.

17. 29 U.S.C. §§ 1001-1381 (1976 & Supp. V 1981). For a discussion of ERISA, see notes 23 & 30-31 and accompanying text *infra*.

18. *See* 29 U.S.C. §§ 151, 1001 (1976). Employee interests protected by the NLRA include "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." *Id.* § 151. The principal interests protected by ERISA are those of employees and their beneficiaries in the receipt of funds from employee benefit plans previously endangered by the "inadequacy of current . . . standards." *Id.* § 1001(a).

19. *See id.* §§ 151, 1001. Congress, in enacting the NLRA, sought to eliminate obstructions to the free flow of commerce: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest . . . ." *Id.* § 151. Similarly, Congress enacted ERISA in recognition of the effect that employee benefit plans have on interstate commerce:

> The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial . . . ; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities. . . .

Id. § 1001(a).

20. R. GORMAN, BASIC TEXT ON LABOR LAW 1 (1976). The three major Acts include the original NLRA of 1935 (Wagner Act), Pub. L. No. 74-198, ch. 337, §§ 1-16, 49 Stat. 449-57 (1935); the Labor Management Relations Act of 1947 (Taft-Hartley Act), Pub. L. No. 80-101, ch. 120, §§ 1-503, 61 Stat. 136-62 (1947); and the Labor Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), Pub. L. No. 86-257, §§ 1-707, 73 Stat. 519-46 (1959). *See* 29 U.S.C. 14-97 & 401-531 (1976).

Section 7 of the Wagner Act protects employee organizational rights. 29 U.S.C. § 157 (1976 & Supp. V 1981). Section 8 of that act declares as unfair labor practices certain employer acts, such as the following: restraint, interference or coercion of employees in the exercise of their section 7 rights; domination of unions; discrimination in terms of employment so as to discourage union membership; and refusal to bargain in good faith with the majority employee representative. *Id.* § 158. For a discussion of section 7, see notes 21-22 and accompanying text *infra*. Section 9 of the Wagner Act created a three-member National Labor Relations Board authorized to

rights of employees protected by section 7 of the NLRA form the heart of

adjudicate unfair labor practice charges and, if necessary, order an appropriate remedy enforceable in the courts of appeals. *See* 29 U.S.C. § 195 (1976). *See also* R. GORMAN, *supra*, at 5.

The Wagner Act also empowered the Board to hold secret elections for the purpose of employee selection of a collective bargaining representative. *See* R. GORMAN, *supra*, at 5.

The Taft-Hartley Act separated the Board's prosecutorial and adjudicative functions between the General Counsel, who was charged with prosecuting unfair labor practice claims, and the Board (increased to five members), which ruled on the merits of the case. Pub. L. No. 80-101, 61 Stat. 139 (codified as amended at 29 U.S.C. § 153 (1976)). In addition, section 7 was amended to accord employees the right to refrain from joining a union or engaging in other concerted labor activities. Pub. L. No. 80-101, 61 Stat. 140 (codified as amended at 29 U.S.C. § 157 (1976)). Section 8 was amended to enumerate several types of union unfair labor practices such as interfering with employee section 7 rights, causing an employer to discriminate against non-union employees and refusing to bargain in good faith. Pub. L. No. 80-101, 61 Stat. 140 (codified as amended at 29 U.S.C. § 158 (1976)).

The Landrum-Griffin Act is addressed "primarily to the problems of corruption within union leadership . . . and of undemocratic conduct of internal union affairs, which was to be cured by a 'bill of rights' for union members in such matters as union meetings and elections, eligibility for office, and union disciplinary procedures." *See* R. GORMAN, *supra*, at 6. *See* Landrum-Griffin Act, Pub. L. No. 86-257, 73 Stat. 519-46 (codified as amended at 29 U.S.C. §§ 401-531 (1976)). For a further discussion of the LMRDA, see notes 25-29 and accompanying text *infra*.

The NLRA was enacted under the commerce clause of the United States Constitution. *See* Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 772 (1947). The commerce clause, article I, § 8 of the United States Constitution, provides in pertinent part as follows: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several states." U.S. CONST. art. I, § 8, cl. 3. The immediate incentive for enacting the NLRA was to speed the economic recovery of the 1930's. *See* D. BOK, A COX & R. GORMAN, LABOR LAW 73 (9th ed. 1981) [hereinafter cited as BOK].

Prior to the enactment of the NLRA, the Supreme Court narrowly construed Congress' power under the commerce clause, invalidating several attempts by the legislature to regulate the employer-employee relationship. *See, e.g.*, Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (wage and hour limitations promulgated under the National Industrial Recovery Act of 1934 held invalid as not within the commerce power because the regulated practices had only an "indirect effect" on interstate commerce); Adair v. United States, 208 U.S. 161 (1908) (invalidating a federal statute making it unlawful to discharge or otherwise discriminate against an employee because of union membership, since regulation of labor relations was beyond the scope of Congress' commerce power and was therefore unconstitutional). *See also* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (holding that Congress lacked power to regulate labor standards in the bituminous coal production industry); Railroad Retirement Bd. v. Alton R. Co., 295 U.S. 330 (1935) (holding invalid a law which established a compulsory retirement and pension plan for all carriers subject to the Interstate Commerce Act). For a general discussion of the Court's early New Deal commerce clause interpretation, see G. GUNTHER, CONSTITUTIONAL LAW 142 (10th ed. 1980).

However, in 1937, the Court adopted a more expansive interpretation of Congress' commerce clause power, and sustained a number of regulatory statutes. *See id.* at 150. For a discussion of President Franklin D. Roosevelt's "Court-Packing Plan" of 1937 and its impact on the subsequent shift in Supreme Court commerce clause decisions, see *id.* at 150-61. Among these newly approved regulatory statutes was the National Labor Relations Act of 1935 (Wagner Act) which granted employees significant rights and protected labor union activity. *See* NLRB v. Jones & Laughlin Steel

federal labor law.[21] Under section 7, employees are guaranteed the freedom to form or join labor unions, to engage in concerted activity, and to bargain collectively through representatives of their own choosing.[22]

ERISA safeguards employee health, welfare and pension plan benefits through a comprehensive system of regulations establishing minimum standards of vesting, funding, and fiduciary designed to "remedy certain defects in the retirement system which limit the effectiveness of the system in providing retirement income security."[23]

Corp., 310 U.S. 1 (1937). In *Jones & Laughlin*, the NLRB had issued a cease and desist order against an employer for violation of the Wagner Act's prohibition on union-based discrimination, but the court of appeals had refused to enforce the Board's order. *Id.* at 22. The Supreme Court reversed, holding that the NLRA and the Board's orders promulgated thereunder were valid and enforceable. *Id.* at 29 n.9. The Court explained that the rights granted employees by section 7 of the Wagner Act were an essential condition of industrial peace:

> Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent's employees to self-organization and freedom in the choice of representatives for collective bargaining.

Id. at 42-43.

21. *See* BOK *supra* note 20, at 69-77. Section 7 of the NLRA provides in pertinent part as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1976).

22. 29 U.S.C. § 157 (1976). Prior to the enactment of § 7, laws regulating labor relations evinced an anti-union animus. *See* R. GORMAN, *supra* note 20, at 1-5. In the early nineteenth century, organizational activity for the purpose of improving wages and working conditions was met with criminal prosecution. *Id.* In the late nineteenth and early twentieth centuries, labor activity was controlled through the use of civil injunctions. "Concerted activities in support of such unionization—strikes, picketing and boycotts (of the employer or its product)—were treated as conspiracies which restrained trade and which inflicted irreparable damage upon the affected employer." *Id.* at 1. The federal courts also played an active role in enjoining concerted labor activity "in part through the diversity of citizenship jurisdiction . . . and in part through the jurisdiction accorded by federal antitrust laws." *Id.* at 2-3. Congress, however, forced a shift in the judiciary's approach to labor-management disputes when it passed the Norris-LaGuardia Act in 1932. Pub. L. No. 65, ch. 90, § 1, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1976)). The Norris-LaGuardia Act "declared it to be the public policy of the United States that employees be permitted to organize and bargain collectively free of employer coercion and sought to achieve that goal by regulating and in most cases barring altogether the issuance of injunctions in a 'labor dispute.'" R. GORMAN, *supra* note 20, at 4. Congress subsequently solidified its control over labor-management relations with the enactment of the NLRA in 1935 where it announced a more "affirmative policy" towards protecting employee rights. *Id.* at 5-6. For a discussion of the NLRA and subsequent federal acts, see notes 16-31 and accompanying text *supra*.

23. H. REP. NO. 533, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4639, 4643. The report explained as follows:

> The growth and development of the private pension system in the past two decades has been substantial. Yet, regulation of the private system's scope

Both ERISA and the NLRA regulate fiduciary qualifications.[24] Within the NLRA, these provisions are contained in the LMRDA[25] which was en-

---

and operation has been minimal and its effectiveness a matter of debate. The assets of private plans, estimated to be in excess of $150 billion, constitutes the only large private accumulation of funds which have escaped the imprimatur of effective federal regulation.

Id. at 3, 1974 U.S. CODE CONG. & AD. NEWS at 4641.

Prior to ERISA, federal pension regulation essentially consisted of three statutes "accomplishing different purposes and vested within different federal departments for enforcement." *Id.* at 5, 1974 U.S. CODE CONG. & AD. NEWS at 4641. In 1958, Congress adopted the Welfare and Pension Plan Disclosure Act (Disclosure Act). Pub. L. No. 85-836, 72 Stat. 997 (codified as amended at 29 U.S.C. § 301 et. seq. (1976)). The Act's requirements were to be administered through the Secretary of Labor. *Id.* at 4, 1974 U.S. CODE CONG. & AD. NEWS at 4642. The Disclosure Act was designed to protect the interests of plan beneficiaries by requiring the plan administrators to file and disclose various financial reports and send, upon written request, an annual copy of the plan report to the beneficiaries and the Secretary. *Id.* at 4, 1974 U.S. CODE CONG. & AD. NEWS at 4642. The 1962 amendments to the Disclosure Act made theft, embezzlement, bribery, and kickbacks federal crimes if they occurred in connection with employee pension and welfare plans. *Id.* The amendments conferred investigatory and rulemaking responsibility upon the Secretary and imposed the requirement that plan officials be bonded. *Id.* In addition to the Disclosure Act, § 302 of the Labor Management Relations Act (LMRA) regulated pension and welfare plans, specifically those administered jointly by the employer and labor unions. 29 U.S.C. § 302 (1976). Absent from these regulations were guidelines regarding funding adequacy, vesting benefits, and security of investment of fiduciary conduct. *Id.* at 4, 1974 U.S. CODE CONG. & AD. NEWS at 4642-43. Finally, the Internal Revenue Code established guidelines for employer tax deductions and for contributions made to employee benefit plans. *Id.*

ERISA was enacted to provide uniform pension regulation, which Congress deemed necessary because of the enormous growth of pension systems and the inadequate protection of employee rights under existing federal law: "In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding." *Id.* at 5, 1974 U.S. CODE CONG. & AD. NEWS at 4643.

24. *See* 29 U.S.C. §§ 504, 1111 (1976).

25. *Id.* §§ 401-531. Title V of the LMRDA outlines the fiduciary responsibilities and requisite qualifications of union leaders. *See id.* §§ 501-504. Section 501 provides that union officials occupy a position of trust in relation to the organization and its members, and further that these officials are subject to criminal penalties for misuse of union funds. *See id.* § 501(a). For a further discussion of § 501, see note 28 and accompanying text *infra*. Section 502 requires the bonding of every "officer, agent, shop steward, or other representative or employee of any labor organization . . . to provide protection against loss by reason of acts of fraud or dishonesty on his part directly or through connivance with others" if the union has property or financial receipts in excess of $5,000. 29 U.S.C. § 502(a) (1976). If the representative is not bonded, then he is prohibited from exercising control over those funds and subject to criminal sanctions of fines and/or imprisonment. *Id.* § 502(b). Section 503 prohibits a labor organization from both making loans to its officers in excess of $2,000 or paying either directly or indirectly the fine for any official convicted of willful violations of Title V. *Id.* § 503(a), (b). Section 504 prohibits certain persons from holding union office if they have been a member of the Communist Party or convicted of a felony "during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprison-

acted in part to stem the tide of criminal infiltration into labor unions.[26] The reporting and disclosure provisions of the LMRDA require every labor organization to file a statement with the Secretary of Labor setting forth certain information relating to finances and internal activities.[27] LMRDA

ment." *Id.* § 504(a). For a further discussion of § 504, see note 29 and accompanying text *infra*.

26. *See* S. REP. NO. 187, 86th Cong., 1st Sess. 5-7, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2318-2421. The Senate report states that "[t]hese and other provisions of the bill . . . represent a major attack on the abuses and problems identified by recent investigations . . . . The bill is designed to prevent, discourage and make unprofitable improper conduct on the part of union officials and employers and their representatives." *Id.* at 4-5, 1959 U.S. CODE CONG. & AD. NEWS at 2321.

The Report of the McClellan Committee provided the impetus for the enactment of the LMRDA. *See* Nelson v. Johnson, 212 F. Supp. 233, 248 (D. Minn.), *aff'd*, 325 F.2d 646 (8th Cir. 1963). *See generally Interim Report of the Select Comm. on Improper Activities in the Labor or Management Fields*, S. REP. NO. 1417, 85th Cong., 2d Sess. (1958) [hereinafter cited as *Select Committee Interim Report*]. The McClellan Committee undertook an investigation of five unions to determine the need for labor reform legislation. *See Nelson*, 212 F. Supp. at 263. The findings reported by the Committee revealed that officials of the investigated unions often ignored the democratic rights of union members. *See id.* at 263-69. In its investigation of the Teamsters Union, the Committee stated as follows:

> Teamster officials have crushed democracy within the union's ranks. They have rigged elections, hoodwinked and abused their own membership, and lied to them about the conduct of their affairs. They have advanced the cause of union dictatorship and have perverted or ignored their own constitution and bylaws.

Id. at 266 (quoting *Select Committee Interim Report*, *supra*, at 443-50). In addition to official disregard of employee rights, the Committee reports revealed a significant amount of official corruption. *See generally* Clark, *The Fiduciary Duties of Union Officials Under Section 501 of the LMRDA*, 52 MINN. L. REV. 437 (1967). This commentator noted, "One of the Committee's overall findings was that union funds in excess of 10 million dollars were either stolen, embezelled or misused over a period of fifteen years by officials of the five unions investigated." *Id.* at 437 (citing *Select Committee Interim Report*, *supra*, at 1).

27. 29 U.S.C. §§ 201-211 (1976). Title II of the LMRDA imposes reporting and disclosure requirements on both labor unions and employers. *Id.* Professor Bok has noted, "Certain of these provisions, requiring the filing of various sorts of information, are founded on the premise that public opinion and democratic processes within the union can curb much abuse if information concerning union activities is systematically collected and made available." BOK, *supra* note 21, at 1186. Section 201(a) requires the union to send to the Secretary of Labor information setting forth such items as the name and address of the organization, the names of officers, initiation fees and dues, financial audits, and procedures regarding membership qualifications. 29 U.S.C. § 201(a) (1967). Section 201(b) requires the union to file information concerning its assets and liabilities and loans received by an officer or extended by the organization to any business enterprise. *Id.* § 201(b). Section 201(c) requires that the information sent to the Secretary under § 201(a), (b) be made available for examination by union members. *Id.* § 201(c). In addition, a union official is required by § 202(a) to report to the Secretary of Labor all income received by himself, his spouse, and his minor child, from employers with whom his union deals, either commercially or as a bargaining representative. *Id.* § 202(a). Section 203 requires employers to report all loans to any official, agent, or other representative of a labor union and also to disclose any funds expended in a manner designed to influence employees in the exercise of their rights to organize and bargain collectively. *Id.* § 203. Section 209 imposes criminal sanctions for anyone who wilfully violates Title

section 501 declares that union officials "occupy positions of trust" in relation to the organization, and mandates that they hold, manage, and invest union funds "solely for the benefit of the organization" in accordance with its constitution and bylaws.[28] In addition, section 504 of the LMRDA prohibits persons convicted of specific designated offenses from holding union office.[29]

Similarly, ERISA prohibits a convicted felon from serving as a plan

---

II or knowingly falsifies information. *Id.* § 209. Other provisions of the LMRDA include Title IV which regulates the internal election procedures of labor organizations and Title I creating a "Bill of Rights" for union members. *Id.* § 101-105 & 401-404. Section 101(a) provides that all union members shall have equal rights to vote and attend meetings, freedom of speech and assembly, the right to vote on dues increases, the right to institute court actions whether or not the labor organization is named as a defendant, and the right to due process before union disciplinary proceedings are initiated. *Id.* § 101(a)(1)-(5). Section 102 allows union members to sue if their Title I rights have been infringed, while section 104 allows union members to obtain copies of collective bargaining agreements. *Id.* §§ 102 & 104.

28. 29 U.S.C. § 501(a) (1976). Union officials are prohibited from dealing with the organization as or in behalf of an adverse party and from "holding or acquiring any pecuniary or personal interest which conflicts with the interests of [the] organization." *Id.* Section 501(c) imposes criminal sanctions for any individual who "unlawfully and willfully abstracts or converts" union funds for his own use. *Id.* § 501(c).

Congress deemed § 501 necessary because it felt that "no responsible trade union officials should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative." *See* S. REP. NO. 187, 86th Cong., 1st Sess. 5-7, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2330-31 (quoting the ethical practice codes of the American Federation of Labor and Congress of Industrial Organizations). For the text of the AFL-CIO ethical codes, see generally 80 MONTHLY LAB. REV. at 352. The senate report stated, "[A]fter the McClellan committee hearings no one can dispute the simple fact that although the vast majority of union officials are honest and conscientious men, a small number have ignored this basic standard of conduct." *See id.* at 14, 1959 U.S. CODE CONG. & AD. NEWS at 2331. Thus, the report justifies inclusion of fiduciary standards into the LMRDA by explaining,

> The financial conduct of labor unions and their officers is a proper concern of the Federal Government. This is so because the funds which pass through union treasuries and for which unions and their officers are responsible are very large, and the uses to which these funds are put have a substantial impact on the nation's economy. Furthermore, if unions are to enjoy the protection of rights such as are guaranteed to them by the National Labor Relations Act and the Railway Labor Act, they ought also to be held responsible for abuses that have accompanied the exercise of these rights by some union leaders.

Id. at 8, 1959 U.S. CODE CONG & AD. NEWS at 2324.

29. 29 U.S.C. § 504(a)(1976). Section 504(a) prohibits any person who has been a member of the Community Party within the past five years or who has been convicted of a crime such as robbery, bribery, extortion, embezzlement, grand larceny, murder, rape, and assault from holding union office for five years after his conviction or after the end of his imprisonment. *Id.* The Supreme Court has, however, declared that the Communist Party provisions set forth in § 504(a) are unconstitutional as a bill of attainder. U.S. v. Brown, 381 U.S. 437 (1965). *See* U.S. CONST. art. I, § 9, cl. 3. The Court explained that Congress does have the power to prevent persons from becoming union officials if they are likely to cause political strikes, but that the decisions as to who those persons are must be left to the courts. *Brown*, 381 U.S. at 449-50. Application of the prior conviction provision of § 504(a) has been held not to

fiduciary or administrator "during or for five years after such conviction or after the end of such imprisonment, whichever is the later."[30] In addition, ERISA details the responsibilities of plan fiduciaries and provides for enforcement through an action for damages or removal.[31]

By virtue of the supremacy clause of the United States Constitution, federal statutes such as the NLRA and ERISA may be interpreted to preempt concurrent state legislation.[32] The "clear-cut" preemption cases are said to be those in which a state law is in actual conflict with federal law, or where Congress, acting pursuant to a plenary power, specifically prohibits parallel state legislation.[33] Outside the "clear-cut" areas, courts have had to apply an ad hoc balancing analysis in ruling on preemption questions.[34] In such cases, the goal is to determine whether, under the circumstances of the

---

violate the constitutional prohibitions against bills of attainder or ex-post facto laws. Postma v. Local 294, International Bhd. of Teamsters, 337 F.2d 609 (2d Cir. 1964).

30. 29 U.S.C. § 1111(a) (1976).

31. *See id.* § 1109(a). Section 1109(a) provides as follows:

> a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

Id. The responsibilities imposed on plan fiduciaries include the obligation to discharge their duties with the care, skill and prudence of an ordinary reasonable person "solely in the interests of the participants and beneficiaries" for the purpose of providing benefits and defraying reasonable administrative expenses. *Id.* § 1104(a). The duties of fiduciaries generally include participating in the drafting of a written instrument for the implementation of a funding policy in accordance with ERISA standards, the naming of a plan trustee to manage and control the assets of the plan, and, at the fiduciary's option, appointing an investment manager or managers to manage the assets of a plan. *Id.* §§ 1102-1103.

32. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) (the Federal Alien Registration Act preempts a state law requiring aliens over 17 to register and satisfy other requirements). For a discussion of *Hines*, see note 35 and accompanying text *infra*. The supremacy clause provides as follows:

> This Constitution and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary not withstanding.

U.S. CONST. art VI, cl. 2. For a discussion of preemption analysis under both the NLRA and ERISA, see notes 45-86 and accompanying text *infra*.

33. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 292 (2d ed. 1983) [hereinafter cited as NOWAK]. If federal law and state law are in such conflict that both cannot stand, federal law clearly overrides the conflicting state law. *Id.* Similarly, if Congress expressly states its intent to preempt an entire field, or, conversely, expressly authorizes concurrent state legislation, preemption analysis is simplified. *Id.*

34. *Id.* at 293. Preemption principles are designed to "avoid conflicting regulation of conduct by various official bodies which might have some authority over the

particular case, state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.[35] The Supreme

---

subject matter. Where there are no indicia of congressional intent, the [c]ourt may have to balance the state and federal interests, to achieve this end." *Id.*

However, when a federal court is faced with a challenge to a state law on preemption grounds, it often avoids the preemption question by invoking the doctrine of abstention. One of the chief purposes of the abstention doctrine is to insure against an erroneous interpretation of the state statute in question by allowing a state court to determine the parameters of the state statutory or administrative scheme. *See, e.g.*, Drucker v. Sullivan, 458 F.2d 1272 (1st Cir. 1972) (affirming district court decision to abstain from deciding whether city rent control act was applicable to Federal Housing Administration project where state courts had not ruled on the issue of whether the ordinance was authorized by the state enabling act).

The Supreme Court first developed the principle of abstention in *Railroad Comm'n v. Pullman Co.* *See* 312 U.S. 496 (1941) (abstention appropriate in a suit for violation of the federal constitution when it was unclear whether a state railroad commission's order violated a state anti-discrimination law). In *Pullman* abstention cases, the district court retains jurisdiction over the action while the parties submit an unclear question of state law to the state courts. *See* England v. Louisiana State Bd. of Medical Examiners, 374 U.S. 411 (1964) (a party has the right to return to the district court for a final determination of his claim after obtaining the authoritative state court construction for which the court abstained). *See also* C. WRIGHT, FEDERAL COURTS 304 (4th ed. 1981). *Pullman* abstention is usually invoked to avoid deciding a constitutional issue unless it is necessary to do so. *See Pullman*, 312 U.S. at 498. *See also* NOWAK, *supra* note 33, at 100-01.

A second abstention principle, known as *Burford* abstention, requires federal courts to avoid interfering with comprehensive state administrative schemes. *See* Burford v. Sun Oil Co., 314 U.S. 315 (1943) (affirming district court decision to abstain from hearing an appeal from a state commission's order denying oil drilling leases when the state legislature had established a system of thorough judicial review by its own state courts). *See generally* Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 YALE L.J. 850 (1964).

The third form of abstention bars a federal court from enjoining pending state proceedings based on principles of comity. *See* Younger v. Harris, 401 U.S. 37 (1971) (reversing judgment of district court enjoining state prosecution because of national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances). *See also* Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (applying *Younger* to civil nuisance litigation where the state's interest in the proceeding was as strong as it would have been if it were a criminal action).

35. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (footnote omitted). *Hines* was one of the Court's earliest attempts to formulate analytical standards for preemption decisions. NOWAK, *supra* note 33, at 293-94. In *Hines*, the Court held that a 1939 Pennsylvania statute requiring aliens over 17 to register and satisfy other requirements was preempted by the Federal Alien Registration Act of 1940. *Hines*, 312 U.S. at 68. The Federal Alien Registration Act was passed in 1940 after a three-judge district court had enjoined enforcement of the state statute as an "encroachment" on federal legislative authority. *Id.* at 60. On direct appeal, the Supreme Court considered only the claim that the 1940 Federal Act precluded the enforcement of the state law. *Id.* at 62. The *Hines* Court concluded that the need for uniformity justified preemption explaining that "[w]hether or not registration of aliens is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable . . . ." *Id.* at 73. The Court further stated that when Congress added the 1940 Act to its uniform naturalization and immigration laws, "it plainly manifested a purpose to do so . . . through one uniform registration system . . . . Under these circumstances the Pennsylvania Act cannot be enforced." *Id.* at 74.

Court has indicated that state law is to be treated as superseded only when Congress clearly manifests an intent to do so.[36]

The Supreme Court has found that federal legislation preempted not only state laws regulating areas of traditionally federal concern, but also state laws governing local interests when the state regulation conflicts with the federal scheme.[37] In the former category, the Court has held that federal legislation preempted state sedition acts,[38] state alien registration statutes,[39] and state common law actions affecting the control of federally regulated railroads.[40] The Court has also invalidated state laws relating to local interests such as the identification and sale of tobacco,[41] the revocation of drivers'

36. NOWAK, *supra* note 33, at 292-93 (citations omitted). In early preemption cases, the Supreme Court presumed the validity of concurrent state laws, yet frequently found the presumption had been overcome. *See, e.g.*, Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947). In *Rice*, the Court explained its preemption analysis as follows:

> [Congressional] purpose [to preempt state law] may be evidence in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose or the state policy may produce a result inconsistent with the objective of the federal statute.

Id. at 230 (citations omitted). In *Rice*, the Court concluded that the pervasiveness of the United States Warehouse Act, evidenced by its extensive licensing provisions and regulation of rates and storage facilities, justified the inference that the Federal Act superseded the state Public Utilities and Grain Warehouse Acts. *Id.* at 236. In more recent cases, the Court has indicated a reluctance to infer or second guess congressional intent. *See* NOWAK, *supra* note 33, at 295. *See* Goldstein v. California, 412 U.S. 546 (1973). At issue in *Goldstein* was whether federal copyright laws preempted a California statute which made it a crime to "pirate" recordings made by others. *Id.* at 567-72. The Court refused to infer an intent by Congress to preempt the copyright field because such an intent was not clearly manifest in the federal laws. *Id.* at 267-71. For a discussion of recent trends in the Court's preemption analysis, see generally G. GUNTHER, *supra* note 21, at 343-57; NOWAK, *supra* note 33, at 292-96; Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515, 529-32 (1972).

37. For a discussion of federal preemption of state laws regulating local interests, see generally G. GUNTHER, *supra* note 21, at 347-52; Note, *Pre-emption as Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959). The latter commentator explains that the Court has adopted a balancing approach in preemption cases similar to that used by the Court in determining whether a state law is invalid as an unjustifiable burden on interstate commerce. Note, *supra*, at 219-21. Thus, the Court will rule against preemption when it is satisfied that valid local interests outweigh the restrictive effect on interstate commerce. *Id.*

38. Pennsylvania v. Nelson, 350 U.S. 497 (1956) (federal anti-communist legislation preempts state law).

39. Hines v. Davidowitz, 312 U.S. 52 (1941). For a discussion of *Hines*, see note 35 and accompanying text *supra*.

40. Chicago & N.W. Transp. Co. v. Kalo Brick and Tile Co., 450 U.S. 311 (1981) (I.C.C.'s exclusive authority to rule on carrier's decision to abandon lines preempted a state action for damages by a local merchant disadvantaged by the decision).

41. *See* Campbell v. Hussey, 368 U.S. 297 (1961) (the 1935 Federal Tobacco

licenses,[42] home mortgage loans,[43] and local noise control ordinances.[44]

Supreme Court decisions regarding preemption of state law by the NLRA generally fall into one of two categories.[45] The first group is comprised of cases holding state laws preempted because they interfered or conflicted with employee substantive rights under federal labor law.[46] Within

---

Inspection Act supersedes provisions of the Georgia Tobacco Identification Act which regulated the inspection and sale of certain types of tobacco). *But cf.* Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (federal statute identifying the maturity date of avocados does not preempt state law establishing different standards for the designation of maturity date).

42. *See* Perez v. Campbell, 402 U.S. 637 (1971) (the Federal Bankruptcy Act provision that bankruptcy effectively discharges all but certain designated judgments preempted Arizona statute which provided that state may revoke a bankrupt's driver's license for failure to satisfy a judgment arising out of operation of a motor vehicle). *But cf.* Maurer v. Hamilton, 309 U.S. 598 (1940) (state law prohibiting trucks from carrying any vehicle "above the cab of the carrier vehicle" not preempted by less restrictive I.C.C. safety regulations for interstate truckers promulgated under the Motor Carrier Act of 1935); Kelly v. Washington, 302 U.S. 1 (1937) (state law requiring safety inspections of tugboats not preempted by Federal Motor Boat Act of 1910). Professor Nowak notes that greater deference has been afforded to health and safety regulations, a traditionally local concern. NOWAK, *supra* note 33, at 294. This deference may explain the result in *Maurer* and *Kelly*. *See id.*

43. *See* Fidelity Federal Savings and Loan Association v. De La Cuesta, 458 U.S. 141 (1982) (Federal Home Loan Bank Board's regulation permitting federally chartered savings and loan associations to exercise due-on-sale clause of mortgage barred application of contrary state doctrine).

44. *See* City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973) (FAA scheme for regulation of aircraft noise and sonic boom superseded local ordinance limiting hours of aircraft departures).

45. *See* Lodge 76 Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976). The *Lodge 76 of Machinists* Court observed as follows:

> Cases that have held state authority to be preempted by federal [labor] law tend to fall into one of two categories: (1) those that reflect the concern that 'one forum would enjoin, as illegal, conduct which the other forum would find legal' and (2) those that reflect the concern 'that the [application of state law by] state courts would restrict the exercise of rights guaranteed by the Federal Acts'. '[I]n referring to decisions holding state laws pre-empted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board.'

Id. at 138 (quoting Automobile Workers v. Russell, 356 U.S. 634, 644 (1958) and Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 n.19 (1969)). For a discussion of labor law preemption analysis under these two theories, see generally BOK, *supra* note 21, at 917-18; R. GORMAN, *supra* note 20, at 766-86; Cox, *Labor Law Preemption Revisited*, 84 HARV. L. REV. 1337 (1972); Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277 (1980); Meltzer, *The Supreme Court, Congress and State Jurisdiction over Labor Relations*, 59 COLUM. L. REV. 6, 269 (1959); Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641 (1961); Note, *Preemption of State Labor Regulations Collaterally In Conflict With the National Labor Relations Act*, 37 GEO. WASH. L. REV. 132 (1968).

46. *See* R. GORMAN, *supra* note 20, at 767. Preemption in this category is based on a "potential conflict between the substantive provisions of federal law and those of state law." *Id.* The concern is that a "state might outlaw concerted activity which

the substantive rights category, the Court has preempted state statutes regulating employee strikes, work stoppages, or other coercive activity,[47] state anti-trust laws as applied to union collective bargaining agreements,[48] unemployment compensation laws denying benefits to workers who filed unfair labor practice charges,[49] and state right to work laws providing remedies for discharges sanctioned by the NLRA.[50]

The second category of NLRA preemption decisions involves jurisdictional considerations grounded on the proposition that the NLRB is the agency vested by Congress with exclusive authority to decide what conduct is protected or prohibited by the NLRA.[51] Within this group, the Supreme

---

the federal government seeks to protect and will thus frustrate the federal policy favoring employee organization or free collective bargaining." *Id.*

47. U.A.W. v. O'Brien, 339 U.S. 454 (1950). The *O'Brien* Court held that the NLRA preempted Michigan's "strike vote" legislation which prohibited the calling of a strike until specific statutory procedures beyond those contained in the NLRA were satisfied. *Id.* at 457-59. The Court ruled that the additional procedures infringed on the worker's right to strike and that Congress, through the provisions in the NLRA, "occupied the field and closed it to state regulation." *Id.* at 457. The Court has also rejected state law restrictions on the right to strike where the asserted justification is a threat to the health and welfare of the state's citizens. *See* Division 1287 of Amalgamated Ass'n of St., Elec. Ry & Motor Coach Employees of Am. v. Missouri, 374 U.S. 74, 82 (1963). *Motor Coach Employees* involved a Missouri law authorizing the Governor to seize a public utility and enforce its continued operation whenever a strike was threatened. *Id.* at 75-76. The Court concluded that such a restriction of the employees' § 7 right to strike was in direct contravention of federal labor law, and could not stand under the supremacy clause of the Constitution. *Id.* at 82. The Court stated that "Missouri, through the fiction of 'seizure' by the state, has made a peaceful strike against a public utility unlawful, in direct conflict with federal legislation which guarantees the right to strike against a public utility, as against any employer engaged in interstate commerce." *Id.* (footnote omitted). *See also* Amalgamated Ass'n of St., Elec. Ry Motor Coach Employees of Am., Div. 998 v. Wisconsin Employment Relations Bd., 340 U.S. 383, 391-97 (1951) (state law forbidding strikes by public utility employees preempted by the NLRA). For a discussion of Supreme Court cases permitting state interference with strikes or picketing, see note 57 and accompanying text *infra*.

48. *See* Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959). In *Oliver*, a state antitrust law was applied to invalidate a collective bargaining agreement between drivers and carriers regulating the terms of motor vehicle leases. *Id.* at 284-89. The *Oliver* Court held that the provision was intended to achieve wage fixing, not price fixing, and since wages were a mandatory collective bargaining topic under federal law, the NLRA preempted this state interference. *Id.* at 293-97.

49. Nash v. Florida Indus. Comm'n., 389 U.S. 235 (1967). The *Nash* Court invalidated a state law denying unemployment compensation to any worker who filed unfair labor practice charges with the NLRB. *Id.* at 235-39. The Supreme Court held that an employee's right to file unfair labor practice charges was essential to the implementation of the nation's labor policies, and that any attempt to thwart the exercise of this right was therefore preempted. *Id.* at 238-40.

50. Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653 (1974). The *Beasley* Court held that § 14(a) of the NLRA which provided that no employer may be compelled to classify supervisors as employees for purposes of collective bargaining, justified the discharge of supervisors for union membership and preempted this application of the state right to work law under which the managers sought relief. *Id.* at 662.

51. Brotherhood of R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369

Court has developed a broad preemption rule[52] and has blocked state attempts to enjoin otherwise lawful strikes and picketing,[53] regulate the selec-

(1969). The *Jacksonville Terminal* Court explained that when referring to NLRA preemption cases, "care must be taken to distinguish preemption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction" of the NLRB. *Id.* at 383 n.19 (citations omitted). Commentators have explained that this latter category of preemption cases is analogous to a "primary jurisdiction" theory of administrative law in which courts defer to the jurisdiction of the NLRB to decide what conduct is protected or prohibited. This practice has been invoked since Congress has "created an administrative agency—expert, experienced, [and] peculiarly sensitive to federal values in the areas of labor-management relations." BOK, *supra* note 21, at 916-20. For a discussion of the two types of NLRA preemption cases, see generally R. GORMAN, *supra* note 20, at 766-86.

52. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). In *Garmon*, the Court explained as follows: "[W]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.* at 245. *Garmon* involved a dispute arising from a union's effort to obtain a union shop provision in its agreement with the employer. *Id.* at 237. The employer refused, and when the union began picketing at his place of business, the employer sued in state court. *Id.* The court issued an injunction and ordered payment of damages. *Id.* at 238. At the time the state action was initiated, the employer began representation proceedings before the NLRB. *Id.* at 238. The Board declined jurisdiction "presumably because the amount of interstate commerce involved did not meet the Board's monetary standards in taking jurisdiction." *Id.* at 238. The trial court's decision was affirmed by the state supreme court. *Id.* The United States Supreme Court reversed, however, holding that the NLRA preempted this application of state tort law. *Id.* at 246. The Court explained that when it is clear or may fairly be assumed that the activity regulated by the state is protected by § 7 or is an unfair labor practice under § 8 (i.e. prohibited activity) the state jurisdiction must yield. *Id.* at 244. Even when it is not clear whether federal law provides an avenue for challenging alleged violations of labor law, it is "essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Id.* at 244-45.

The *Garmon* Court recognized exceptions to this rule, noting that states could regulate in areas "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act, . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the states of the power to act." *Id.* at 243-44 (citations and footnote omitted). For a further discussion of the deeply-rooted local interest exception, see notes 59-60 and accompanying text *infra*.

53. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957) (NLRB's exclusive authority to decide whether picketing is an unfair labor practice preempts state labor board's jurisdiction to decide similar charges under state law); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955) (NLRB decision that strike did not constitute an unfair labor practice preempted state court injunction prohibiting the conduct as an unlawful restraint of trade, because the NLRB is vested with exclusive authority to determine the legality of work stoppages); Garner v. Teamsters, Local Union No. 776, 346 U.S. 485 (1953) (state law utilized to enjoin work stoppage preempted as an intrusion on NLRB's jurisdiction to adjudicate unfair labor practices). *But see* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) (upholding a state court's authority to enjoin picketing in a particular place on trespass theory). The *Sears* Court felt that since the issue presented at the state level concerned the location, rather than the lawfulness of the picketing, there was no imper-

tion of collective bargaining agents,[54] or resolve union membership disputes.[55] However, the Court has rejected jurisdictional preemption in cases where there is no threat of interference with the federal administrative scheme and the aggrieved party does not have access to the Board's jurisdiction,[56] or where the protection of significant local interests depends on the application of state law.[57]

---

missible interference with the Board's unfair labor practice jurisdiction. *Id.* at 197-200. The Court rejected the argument that all state action which affected picketing was barred because of the protected nature of the activity. *Id.* at 200-08. The Court also drew support for its holding from the fact that circumstances prevented Sears from gaining access to the Board unless the union filed unfair labor practice charges. *Id.* at 201. The Court concluded, therefore, that Sears' only viable remedy was the state trespass action. *Id.* at 202. In addition to trespass actions, the Supreme Court has permitted state interference with strikes or picketing if the union conduct endangered the public safety. For a discussion of these cases, see note 57 and accompanying text *infra*. *But see* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (trespass theory not available to prohibit nonemployee union members from distributing union literature on company property).

54. La Crosse Telephone Corp. v. Wisconsin Employment Relations Bd., 336 U.S. 18 (1949). *La Crosse Telephone* involved a representation dispute between two rival unions. *Id.* at 20. One union had been voluntarily recognized by the employer as the bargaining agent of the employees. *Id.* The rival union petitioned the state Employment Relations Board, which initiated election procedures resulting in the rival union's certification. *Id.* The Supreme Court held that the NLRA preempted application of the state procedures. *Id.* at 24-27. The Supreme Court stated that "certification by a State board under a different or conflicting theory of representation . . . [is] disruptive of the practice under the Federal act . . . ." *Id.* at 26. The Court concluded that the problem of employee representation is a delicate one and "[t]he uncertainty as to which board is master . . . can be as disruptive of peace between various industrial factions as actual competition between two boards for supremacy." *Id. Accord* Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767 (1947) (state labor board could not exercise jurisdiction to consider whether foreman bargaining units would be recognized since § 9(b) of the NLRA gives the NLRB exclusive power to determine appropriate bargaining units).

55. Amalgamated Ass'n of St. Elec. Ry. and Motor Coach Employees v Lockridge, 403 U.S. 274 (1971). *Lockridge* involved an action brought in state court by a former union member against the union for reinstatement to membership and for damages resulting from wrongful discharge from membership in violation of the union's constitution. *Id.* at 277-79. As a result of his loss of membership, plaintiff was discharged from employment under a union security clause in the collective bargaining agreement. *Id.* at 280. The state court entered judgment for the plaintiff. *Id.* The Supreme Court reversed, holding that resolution of such disputes was within the exclusive jurisdiction of the NLRB, which preempted the state court's jurisdiction. *Id.* at 287-92. *But cf.* International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958) (upholding state court damage award based upon violation of union's constitution and by-laws where there was no need to construe the union security clause of the collective bargaining agreement).

56. *See* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978). For a discussion of *Sears*, see note 53 *supra*.

57. *See* U.A.W. v. Russell, 356 U.S. 634 (1957); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); Construction Workers v. Laburnum, 347 U.S. 656 (1954); Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942). *Russell*, *Youngdahl*, *Laburnum*, and *Allen-Bradley* all held that a state law may validly be applied to enjoin violent picketing, picketing with substantial threat of imminent violence, and other activity inimical to the public safety. *See Russell*, 356

Recently, the Supreme Court, in *Local 926, International Union of Operating Engineers v. Jones*,[58] articulated a comprehensive test applicable in both substantive and jurisdictional preemption cases which incorporates previously recognized exceptions to the general rule invalidating state laws which conflict with the federal scheme.[59] The *Jones* Court held that state laws cur-

---

U.S. at 642-45; *Youngdahl*, 355 U.S. 139-40; *Laburnum*, 347 U.S. at 659-69; *Allen-Bradley*, 315 U.S. at 745-48. *See also* Farmer v. United Bhd. of Carpenters and Joiners, 430 U.S. 290 (1977) (NLRA does not preempt state cause of action for intentional infliction of emotional distress brought by union member against the labor organization and its officials); Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53 (1966) (application of state defamation law to remedy tort occurring during union organizational campaign not preempted by NLRA as the action was not within the exclusive jurisdiction of the NLRB).

The Supreme Court has stated that local interests must be considered when deciding NLRA preemption cases. *See* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978). The *Sears* Court explained that "the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulations without careful consideration of the relevant impact of such a jurisdictional bar on the various interests affected." *Id.* at 188.

58. 103 S. Ct. 1453 (1983). At issue in *Jones* was the question of whether the NLRA preempted a state cause of action for intentional interference with contractual relations. *Id.* at 1456. Plaintiff, a union member, argued that union leaders had forced the company to discharge him shortly after his appointment to a supervisory position. *Id.* Plaintiff then filed unfair labor practice charges against the union. *Id.* The Board's Regional Director dismissed the complaint for lack of evidence. *Id.* at 1457. Instead of appealing to the General Counsel, plaintiff proceeded in state court against both the union and the company, claiming that the union coerced the company into breaching its employment contract with him. *Id.* The Supreme Court held that the NLRA preempted the state cause of action. *Id.* at 1458-62. The Court reasoned that if the union coerced the employer to discharge the plaintiff, then its conduct was arguably prohibited by the NLRA and subject to the exclusive jurisdiction of the NLRB. *Id.* at 1459-61. Moreover, the Court stated that the Regional Director's dismissal for lack of evidence did not abrogate the NLRB's jurisdiction but addressed the merits of the complaint. *Id.* at 1461. *See also* Iron Workers v. Perko, 373 U.S. 701 (1963) (state cause of action for intentional interference with contractual relations preempted by NLRA).

59. *See* 103 S. Ct. at 1458-59. The Court explained that when it is faced with a decision as to whether "particular state causes of action or regulations may coexist with the comprehensive amalgam of substantive law and regulatory arrangements . . . set up in the NLRA," it has employed the following approach:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA . . . . [If so], otherwise applicable State law and procedures are ordinarily preempted . . . . When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct . . . . The question of whether regulation should be allowed because of the deeply rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

tailing NLRA protected rights are "ordinarily preempted" unless they implicate local interests sufficient to outweigh their interference with the federal regulatory scheme, or regulate conduct that is only of "peripheral concern" to the NLRA.[60]

In applying the substantive-rights strand of preemption analysis, the Supreme Court has twice considered the validity of state enactments which set forth qualifications for union leadership.[61] In *Hill v. Florida*,[62] a non-licensed union representative challenged a Florida law requiring the licensing of all union business agents.[63] Under the challenged statute, a license would be granted only if the applicant could meet certain specified conditions.[64] The Supreme Court held that the qualification provision was inva-

---

Id. at 1458-59.

60. *Id.* at 1458-59. *See* Farmer v. United Bhd. of Carpenters and Joiners, 430 U.S. 290 (1977). The *Farmer* Court explained that the exceptions "in no way undermine the vitality of the pre-emption rule." *Id.* at 297 (quoting Vaca v. Sipes, 386 U.S. 171, 180 (1967)). Rather, the Court stated that in a case where the exceptions do apply they merely "highlight [our] responsibility . . . to determine the scope of the general rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." *Id. Farmer* involved an action brought by a discharged union member against the Union and its officials, seeking damages arising from an alleged intentional infliction of emotional distress. *Id.* at 292-94. The Court recognized that there was some risk that the state cause of action would touch on an area of primary federal concern, but "[v]iewed . . . in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens." *Id.* at 304. *See also* Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 188 (1978); DeVeau v. Braisted, 363 U.S. 144, 152 (1960) ("doctrine of pre-emption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state power"). For a discussion of *Sears*, see note 53 and accompanying text *supra*. For a discussion of *DeVeau*, see notes 67-73 and accompanying text *infra*.

61. *See* DeVeau v. Braisted, 363 U.S. 144 (1960); Hill v. Florida, 325 U.S. 538 (1945). *See generally* R. GORMAN, *supra* note 20, at 766-86. Professor Gorman has observed that the objection to these state provisions is that they interfere with employees' right to select representatives of their own choosing as guaranteed by §§ 1 & 7 of the NLRA and are therefore preempted. *Id.* at 770.

62. 325 U.S. 538 (1945).

63. *Id.* at 540. The state statute defined business agent as "any person . . . who shall for a pecuniary or financial consideration, act or attempt to act [on behalf of a union] in soliciting or receiving from any employer any right or privilege for employees . . . ." *Id.* In addition, the law required that all business agent license applications be accompanied by a one-dollar fee and a statement signed by the officers of the union setting forth the agent's authority. *Id.* Failure to comply with these provisions was a misdemeanor. *Id.* The Florida Attorney General brought suit under the licensing provisions to restrain Hill, a union business agent, from operating without a license. *Id.* at 540-41. An injunction was issued despite Hill's contention that the qualification provision violated the NLRA by infringing on employee free choice of bargaining representatives. *Id.* For the text of the NLRA provisions guaranteeing employee free choice of bargaining representatives, see note 21 *supra*.

64. 325 U.S. at 540. The statute required that the applicant be a citizen of the United States for more than 10 years and a person of good moral character, and that he have no record of felony convictions. *Id.*

lid since it inhibited worker freedom of choice by effectively imposing on union members Florida's judgment regarding appropriate qualifications for union leadership.[65] The Court reasoned that freedom of choice is fundamental to the policies of federal labor law and that the state's attempt to restrict employee free choice was "repugnant to the NLRA."[66]

Fifteen years later, in *DeVeau v. Braisted*,[67] the Court upheld a state law which set qualifications for union leadership.[68] *DeVeau* arose in the context of a congressionally-approved compact between New York and New Jersey which sought to eliminate crime and corruption in waterfront employment practices in the Port of New York.[69] Congress had extended its consent to whatever additional legislation was necessary to implement the compact.[70] One of the implementation provisions which was subsequently enacted prohibited the collection of dues by a labor organization if any of its officers had a prior felony conviction.[71] The Court upheld this provision, distinguishing

---

65. *Id.* at 541-43. The Court stated that

> [i]t is apparent that the Florida statute has been so construed and applied that the union and its selected representative are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. . . . Congress attached no conditions whatsoever to [worker's] freedom of choice . . . . "Full freedom" to choose an agent means freedom to pass upon that agent's qualifications . . . [t]o the extent that [the provision] limits a union's choice of such an "agent" or bargaining representative, it substitutes Florida's judgment for the worker's judgment.

Id. at 541.

66. *Id.* at 542.

67. 363 U.S. 144 (1960).

68. *Id.* at 151-58. The qualification provision in *DeVeau* prohibited the solicitation or collection of union membership dues by a labor organization if any officer or agent of such organization had been convicted of a felony unless that officer or agent had received a pardon or certificate of good conduct removing the disability. *Id.* at 145 (citing New York Waterfront Comm'n Act of 1953, § 8 (currently codified at N.Y. UNCONSOL. LAWS § 9933 (McKinney 1974))).

69. 363 U.S. at 149-55. In an effort to combat crime in the Port of New York, the legislatures of New York and New Jersey entered into an interstate compact to create a Waterfront Commission with regulatory authority over waterfront employment practices. *Id.* at 149. The United States Constitution requires that interstate compacts be submitted to Congress for its consent. *See* U.S. CONST. art. I, § 10, cl. 3. Congress consented to the interstate compact. 363 U.S. at 150 (citing Pub. L. No. 83-252, ch. 407, 67 Stat. 541-57 (1953)). The compact's preamble set forth congressional approval for both the compact and "the carrying out and effectuation of said compact, and enactments in furtherance thereof . . . ." *Id.* at 151.

Three years after enactment of the challenged qualifications provision, the President of Local 1346, International Longshoremen's Association was notified that because the organization's secretary-treasurer had been convicted of a felony, the union would be prohibited from collecting membership dues until he was removed. *Id.* at 146. The secretary-treasurer, who had pled guilty to a charge of grand larceny 33 years before the enactment of the Waterfront Commission Act, challenged the Act on the grounds that it restricted employee free choice of a bargaining representative and was preempted by the NLRA. *Id.*

70. *Id.* at 151.

71. *Id.* at 145. Exceptions were provided where the officer had been pardoned

Hill on the basis of Congress' approval of both the compact and its implementing legislation.[72] Because one of the main goals of the compact was to keep criminals away from the waterfront, a goal which had been the subject of an independent congressional investigation, the Court concluded that the qualification provision was within the scope of Congress' approval and not contrary to federal labor policy.[73] In doing so, the Court rejected the argument that the NLRA preempted *all* restrictions upon employees' freedom to choose representatives.[74]

---

by either state's governor or where he had received a certificate of good conduct from a parole board. *Id.*

72. *Id.* at 163. The Court noted that Congress' consent to the compact was not perfunctory. *Id.* at 149-50. It had conducted its own investigations into the problems plaguing the waterfront and concluded that the Act was a viable means of solving these problems. *Id.*

The appellant had argued that since § 8 was not actually part of the compact, Congress did not expressly approve it. *Id.* at 150-51. However, the Court responded by stating that Congress was indeed aware of the provision since it had already been enacted by New York, and since it had been urged as a ground for opposition to the compact by the union during the approval hearings. *Id.* Consequently, the Court concluded, "It is in light of this legislative history that the compact was approved, and that congressional consent was given to 'enactments in furtherance thereof.' " *Id.*

73. *Id.* at 153-57. The court had characterized the first step of its preemption analysis as a determination of whether "Congress, with a lively regard for its own federal labor policy, [would] find a true, real frustration . . . of that policy. . . ." *Id.* at 153. The Court concluded that Congress' consent to additional legislation to effectuate the compact was a sign that Congress viewed state regulations aimed at preventing crime in areas where state concerns are legitimate as compatible with federal labor law. *Id.* at 154. The Court explained, "It is instructive that this unique provision has occurred in connection with approval of a compact dealing with the prevention of crime where, because of the peculiarly local nature of the problem, the inference is strongest that local policies are not to be thwarted." *Id.*

74. *Id.* at 152. The Court observed, "Obviously the [NLRA] does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing.' " *Id.* The Court gave the example that union officials are not immune from criminal prosecution and incarceration simply because they have been chosen as bargaining representatives. *Id.* Rather, the crucial inquiry was whether the congressional purpose behind the NLRA was incompatible with the narrow restriction presented. *Id.* at 153. Applying this standard to the New Jersey-New York compact, the Court concluded that it was not. *Id.*

The appellant had also argued that the qualification provision was preempted by § 504 of the LMRDA, which temporarily prohibited convicted felons from holding union office. *Id.* at 155. For a discussion of the LMRDA, see notes 25-29 and accompanying text *supra*. The Court rejected the argument, stating that the fact that Congress itself imposed qualifications for union leadership "is surely evidence that Congress does not view such a restriction as incompatible with its labor policies." *Id.* at 156. In addition, the Court noted that when Congress intended for the LMRDA to preempt state law, it included specific provisions expressly excluding the operation of state law. *Id.* at 156. The Court concluded that the absence of a specific preemptory provision accompanying the LMRDA's qualification provision was alone "sufficient reason for not deciding that [the LMRDA] pre-empts § 8 of the Waterfront Commission Act." *Id.*. In addition, the Court emphasized that the LMRDA contained a provision allowing states to enforce their criminal laws against union leaders and provided that its provisions, except where explicitly stated, did not reduce the

Congress has facilitated preemption analysis under ERISA by including a provision requiring the preemption of all state laws if they "relate to any employee benefit plan" governed by the federal Act.[75] As a result, the Supreme Court has characterized pension plan regulation as "exclusively a federal concern."[76] Federal courts have found that ERISA preempted state laws prohibiting worker's compensation benefits from being used to offset pension payments,[77] regulating health care benefit plans,[78] and barring discriminatory allocations of plan proceeds.[79] However, state laws regulating areas of traditionally local interest are not preempted.[80]

---

responsibilities of any union official under state law. *Id.* at 157 (citing 29 U.S.C. §§ 604, 603(a) (1959) (current version at 29 U.S.C. §§ 524, 523 (1976))).

75. 29 U.S.C. § 1144(a) (1976). ERISA § 514(a) provides that the Act's provisions "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." *Id.*

76. Alessi v. Raybestos-Manhatten, Inc., 451 U.S. 504, 522-23 (1981). The *Alessi* Court explained that ERISA requires preemption of a broad range of state law directly or indirectly intruding on the federal regulatory scheme. *Id.* at 525. For the text of ERISA's preemption provision, see note 75 *supra*. The Court reasoned that with the enactment of ERISA, "Congress intended to depart from its previous legislation that 'envisioned the exercise of state power over pension funds . . . .' " *Id.* at 523 (quoting Malone v. White Motor Corp., 435 U.S. 497, 512, 514 (1978)). For a discussion of preemption analysis under ERISA, see generally Kilberg & Heron, *The Preemption of State Law Under ERISA*, 1979 DUKE L.J. 383; Macey, *Labor Pains: ERISA and the Evolving Doctrine of Federal Preemption of State Law Relating to Employee Benefit Plans*, 4 SETON HALL LEGIS. J. 1, 35-44 (1978).

77. Alessi v. Raybestos-Manhatten, Inc., 451 U.S. 504 (1981). *Alessi* involved an action by retired employees claiming that their employer had violated a state law prohibiting worker compensation benefits from being used to offset pension benefits. *Id.* at 508. The Supreme Court held that the state law was preempted because it found that the state statute "related to" an employee benefit plan regulated by ERISA. *Id.* at 523-26. The *Alessi* Court reasoned as follows: "Whatever the purpose or purposes of the New Jersey statute, we conclude that it 'relate[s] to pension plans' governed by ERISA because it eliminates one method for calculating pension benefits—integration—that is permitted by federal law." *Id.* at 524.

78. Hewlett-Packard Co. v. Barnes, 571 F.2d 502 (9th Cir.) (state Health-Care Service Plan Act preempted by ERISA because it directly regulates employee benefits plans), *cert. denied*, 439 U.S. 831 (1978); Standard Oil Co. v. Agsalud, 442 F. Supp. 695 (N.D. Cal. 1977) (Hawaii's Prepaid Health Care Act preempted by ERISA), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981).

79. Pervel Indus. v. Connecticut Comm'n on Human Rights, 468 F. Supp. 490 (D. Conn. 1978), *aff'd*, 503 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980). *Pervel* involved an action by a pregnant employee who had been denied disability payments under an employee benefit plan. *Id.* at 492. State law prohibited denial of employer-maintained plan benefits to workers disabled as a result of pregnancy. *Id.* at 491. The district court in *Pervel* concluded that the state's "anti-discrimination law, legislating specifically on the subject of disability benefits, is a law that relates to an employee benefit plan." *Id.* at 492. *Contra* Minnesota Mining and Manufacturing Co. v. Minnesota, 289 N.W.2d 396 (Minn. 1979) (ERISA not intended by Congress to preempt state anti-discrimination laws), *appeal dismissed*, 444 U.S. 1041 (1980).

80. *See* Carpenter's Pension Trust for S. California v. Kronschabel, 632 F.2d 745 (9th Cir.) (ERISA does not preempt state order requiring payment of pension plan proceeds to beneficiaries' spouse as part of community property settlement), *cert. denied*, 453 U.S. 722 (1980); Stone v. Stone, 450 F. Supp. 919 (N.D. Cal. 1978) (California community property law not preempted by ERISA), *aff'd*, 632 F.2d 740 (9th Cir.

Section 411 of ERISA regulates the qualifications of pension plan administrators by prohibiting a convicted felon from serving as a plan fiduciary "during or for five years after such conviction or after the end of such imprisonment whichever is the later . . . ."[81] In *International Longshoremen's Assoc. v. Waterfront Commission v. Waterfront Commission of New York Habor*,[82] the United States District Court for the Southern District of New York held that, despite ERISA's broad preemptive language,[83] the qualification provision did not supersede all concurrent state law.[84] The plan fiduciary, who was disqualified under state law because of a federal felony conviction, argued that the ERISA provision, which defined conviction as occurring on the date of the "final sustaining of such judgment on appeal,"[85] preempted the state law, which defined conviction as occurring on the date of the trial court's

---

1980), *cert. denied*, 453 U.S. 922 (1981). *Accord In re* Marriage of Pardee, 408 F. Supp. 666 (C.D. Cal. 1976). *See also* A.T.&T. v. Merry, 592 F.2d 118 (2d Cir. 1979) (state order directing garnishment of pension plan benefits to satisfy family support obligations is not preempted); Provience v. Valley Clerks Trust Fund, 509 F. Supp. 388 (E.D. Cal. 1981) (ERISA does not preempt state cause of action for fraudulent misrepresentation of the type and adequacy of the benefits provided by a medical plan).

Commentators have noted that most local interest-federal interest conflicts have arisen in the domestic relations area. Kilberg & Heron, *supra* note 75, at 405. These conflicts are said to require a balancing of the state and federal interests, the outcome of which "will often depend upon which state interest is cited as the major one against which the federal interest is balanced." *Id.* at 419-20. The authors contend that the conflict between the language of ERISA and state court support and alimony decrees is "real" and that although "courts have generally reached the just conclusion in these cases, . . . [they] have been forced to stretch the plain meaning of the federal statute to do so." *Id.* at 420.

81. 29 U.S.C. § 1111 (1976). For a discussion of this regulation, see note 30 and accompanying text *supra*.

82. 495 F. Supp. 1101 (S.D.N.Y.), *aff'd in part, rev'd in part on other grounds*, 642 F.2d 666 (2d Cir. 1980), *cert. denied*, 454 U.S. 966 (1981).

83. *See* note 75 *supra*.

84. 495 F. Supp. at 1124. The action involved a suit by a plan fiduciary who was dismissed under the qualification provisions of the Waterfront Commission Act. *Id.* at 1106-09. Amendments to those provisions prohibits any convicted felon from serving as an officer, agent, or employee of a labor organization or fund "unless he has been pardoned or received the requisite certificate of good conduct," makes it unlawful to " 'knowingly permit such convicted person to assume or hold any office,' " and imposes criminal penalties for violations of these prohibitions. *Id.* at 1108 (quoting Waterfront Commission Act, § 8 (currently codified at N.Y. UNCONSOL. LAWS § 9933 (McKinney 1974))). Plaintiff, a disqualified official, was convicted of violating a federal law prohibiting officials of labor organizations from receiving loans from employers of unionized workers. *Id.* at 1108 (citing 29 U.S.C. § 186(b) (1976)). Because the ERISA qualification provision defined conviction as occurring on the date of the final affirmance of such judgment on appeal, plaintiff argued that the state act was preempted since it defined conviction as occuring on the date the trial court rendered judgment. *Id.* at 1109.

85. *Id.* at 1109. ERISA § 411(c)(1) provides as follows:

> A person shall be deemed to have been "convicted" from the date of the judgment of the trial court or the date of the final sustaining of such judgment on appeal, whichever is the later event.

29 U.S.C. § 1111(c)(1) (1976).

judgment.[86] The court held that ERISA did not preempt the state law since "[a] rule that permits removal of union officers upon a guilty verdict, or upon sentence, interferes only marginally with federal labor policy."[87]

New Jersey's Casino Control Act of 1977 both established the Casino Control Commission[88] and detailed the conditions under which the casino gambling industry would be regulated.[89] Section 93 of the Act requires that

86. 495 F. Supp. at 1109.

87. *Id.* at 1124. The court addressed plaintiff's contentions that the state law was preempted by both LMRDA § 502(c) and ERISA § 411(c)(1). *Id.* The court noted that simply because both the LMRDA and ERISA "deem union officers 'convicted' upon successful exhaustion of all appeals" does not mean that Congress "foreclose[d] a state from adopting a more restrictive policy." *Id.* The court reasoned that "[i]f under *DeVeau* New York may lawfully prohibit some convicted persons from serving as union officials even though federal law would allow them to serve, it follows that New York should be permitted to remove 'convicted' officers a few months sooner than federal law mandates." *Id.* For a discussion of *DeVeau*, see notes 68-74 and accompanying text *supra*. *See also* Local 1804, Int'l Longshoremen's Ass'n v. Waterfront Comm'n of New York Harbor, 85 N.J. 606, 428 A.2d 1283 (1981). In *Local 1804*, the New Jersey Supreme Court addressed a similar challenge to the Waterfront Commission Act's qualification provisions. *Id.* at 608-10, 428 A.2d at 1284-85. Applying an interest-balancing test, the court held that ERISA did not preempt the state act since both were aimed at the prevention of crime and corruption and the state law did not obstruct ERISA in any "significant sense." The New Jersey Supreme Court explained,

> The evaluation requires a balancing of the potential for interference by section 8 with ERISA and the willingness of Congress to tolerate that interference. . . . Both Section 8 of the compact and Section 411(c) of ERISA require removal of union officers for their misconduct. Although the statutes have different purposes, they both protect the employees, their unions and the public. The provision of Section 8 . . . differs minimally from the provision of ERISA . . . . Thus viewed, Section 8 does not impinge upon Section 411(c) in any significant sense.

Id. at 615-16, 428 A.2d at 1288-89.

88. *See* N.J. STAT. ANN. § 5:12-1 to 5:12-152 (West Supp. 1983). The Commission is established within the Department of Treasury. *Id.* § 5:12-50. The Commission's authority includes the power to issue subpoenas to compel attendance of witnesses at a Commission hearing, conduct investigative hearings, and require a witness to answer any question. *Id.* §§ 5:12-65 to 5:12-67. The Commission may, if necessary, confer on the witness testimonial immunity. *Id.* Also included within the Commission's authority is the power to collect fees or penalties required pursuant to the provisions of the Act, make such regulations as "it may deem necessary or desirable for the public interest in carrying out the provisions of [the] act," including regulations excluding certain individuals from any "licensed casino establishment," and conduct meetings and make recommendations regarding the "operation and administration of casino control laws." *Id.* §§ 5:12-68, 5:12-73. Finally, "[t]he commission may exercise any proper power or authority necessary to perform the duties assigned to it by law, and no specific enumeration of powers in [the] act shall be read to limit the authority of the commission to administer [the] act." *Id.* § 5:12-75.

89. *See id.* §§ 5:12-63 to 5:12-75. The Act provides in pertinent part as follows: "The Casino Control Commission shall have general responsibility for the implementation of this act . . . including, without limitation, the responsibility: (a) To hear and decide promptly and in reasonable order all license, *registration*, certificate, and permit applications and causes affecting the granting, suspension, revocation, or renewal thereof . . . ." *Id.* § 5:12-63 (emphasis in the original to show recent amendment). In addition, the Act requires that the Commission shall

every labor organization seeking to represent casino employees register annually with the Commission.[90] In addition, section 93 prohibits the collection of membership dues and the administration of pension and welfare funds by the union registrant if any of its officers fail to satisfy the licensee qualification provisions of the Act.[91] The criteria for officer disqualification include convictions for any one of the number of designated offenses and identification as a career offender or as a member or associate of a career offender cartel.[92]

---

assure that licenses, certificates, or permits shall not be issued to nor held by, nor shall there by any material involvement, directly or indirectly, with the licensed casino operation or the ownership thereof by, unqualified or disqualified persons or unsuitable person, or persons whose operations are conducted in a manner not conforming with the provisions of this act. For the purposes of this section, "unqualified person," "disqualified person," or "unsuitable person" shall mean any person who is found by the commission to be disqualified pursuant to the criteria set forth in section 86 . . . or to lack the financial responsibility and capability specified in the provisions of Section 84.

Id. § 5:12-64 (footnotes omitted). The Act requires licensing of casinos and their supervisory personnel, casino employees, and all industries offering goods or services to the casinos. *Id.* §§ 5:12-89 to 5:12-92.

The Act also creates the Division of Gaming Enforcement. *Id.* §§ 5:12-76 to 5:12-79. Established within the Department of Law and Public Safety, which is headed by the Attorney General, the Division is charged with responsibility for investigating all applicants for licenses, certificates, or permits, and prosecuting before the Commission or in the state criminal courts all proceedings for violations of the Act or regulations promulgated thereunder. *Id.*

90. *Id.* § 5:12-93(a). Section 93(a) of the Act provides in pertinent part as follows:

Each labor organization, union or affiliate seeking to represent employees licensed *or registered* under this act and employed by a casino licensee shall register with the Commission annually, and shall disclose such information to the Commission as the Commission may require, including the names of all affiliated organizations, pension and welfare systems and all officers and agents of such organizations and systems.

Id. (emphasis in original to show recent amendment). "Casino hotel employees" include those individuals performing "service or custodial duties not directly related to operations of the casino, including without limitations, bartenders, waiters, waitresses, maintenance personnel, kitchen staff, but whose employment duties do not require or authorize access to the casino." *Id.* § 5:12-8.

91. *Id.* § 5:12-93(b). Section 93(b) provides as follows:

No labor organization, union, or affiliate registered or required to be registered pursuant to this section and representing or seeking to represent employees licensed *or registered* under this act may receive any dues from any employee licensed *or registered* under this act and employed by a casino licensee or its agent, or administer any pension or welfare funds, if any officer, agent, or principal employee of the labor organization, union, or affiliate is disqualified in accordance with the criteria set forth in Section 86 of this Act. The Commission may for the purposes of this Subsection waive any disqualification criterion consistent with the public policy of this act and upon a finding that the interests of justice so require.

Id. 5:12-93(b) (footnote omitted) (emphasis in original to show recent amendment).

92. *See id.* § 5:12-86. Section 93 cross references to the disqualification criteria provided in § 86. *Id.* § 5:12-86(c)(4). Section 86(f) of the Act provides as follows:

Against this background, the Third Circuit in *Danziger* considered whether section 93 of the New Jersey Casino Control Act[93] was preempted by section 7 of the NLRA.[94] Judge Gibbons reviewed the history of New Jersey's regulation of gambling revenues for public or charitable purposes.[95] Judge Gibbons noted that in authorizing casino gambling, the state exacted a tax on private revenues, which was to support programs for the elderly and disabled.[96] Although the casino industry is privately run, the *Danziger* court

---

> The identification of the applicant or any person who is required to be qualified under this act as a condition of a casino license as a career offender or a member of a career offender cartel in such a manner which creates a reasonable belief that the association is of such a nature as to be inimical to the policy of this act and to gaming operations. For purposes of this section, career offender shall be defined as any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of this State. A career offender cartel shall be defined as any group of persons who operate together as career offenders . . . .

Id. § 5:12-86(f). The policies of the Act referenced above are generally to maintain "the public confidence and trust in the credibility and integrity of the regulatory process and of casino operations." *Id.* 5:12-1(b)(6). A union may therefore be disqualified under § 93 if an officer, agent, or principal employee is an "associate of any person whose behavior is pursued in an occupational manner or context for the purpose of economic gain, utilizing such methods as are deemed criminal violations of the public policy of [New Jersey]." *Id.* § 5:12-86(f). For a discussion of state regulation of casino gambling and restrictions on union leadership, see generally Note, *State Regulation of Casino Gambling: Constitutional Limitations and Federal Labor Law Preemption*, 49 FORDHAM L.R. 1038, 1038-48 (1981).

93. 709 F.2d at 823-30 (citing N.J. STAT. ANN. § 5:12-93(a) (West Supp. 1983)). For a discussion of section 93, see notes 90-91 and accompanying text *supra*.

94. 709 F.2d at 823-30 (citing 29 U.S.C. § 157 (1976)). For a discussion of the Union's contentions that § 93 of the Casino Control Act interferes with the NLRA § 7 rights of its members, see note 8 *supra*. The Union also argued that the New Jersey statute was unconstitutionally overbroad and vague. 709 F.2d at 833. However, the court did not reach these arguments because its decision on the preemption issue was sufficient to dispose of the appeal. *Id.*

95. 709 F.2d at 821-23. The court noted that prior to 1844, New Jersey was very tolerant of gambling and authorized numerous lotteries to raise revenues for public or charitable purposes. *Id.* at 821-22. However, the state constitution of 1844 outlawed all lotteries, and an 1897 amendment prohibited all gambling. *Id.* at 822 (citing N.J. CONST. of 1844, art. IV, § 7, ¶ 2). That prohibition lasted until 1939, when a second amendment was passed, allowing pari-mutuel betting on horse races in order to raise state revenues. *Id.* (citing 1939 N.J. LAWS at 1063). The 1947 constitution prohibited gambling except where authorized by general election or conducted by charitable organizations. *Id.* (citing N.J. CONST. of 1947, art. IV, § 7, ¶ 2). A 1969 amendment authorized state lotteries if the entire proceeds were applied to education and state institutions. *Id.* (citing N.J. STAT. ANN. §§ 5:9-1 to 5:9-25 (West 1973)).

96. *Id.* at 821-23. Judge Gibbons observed that in 1976 the constitution was again amended to permit the legislature to authorize casino gambling in Atlantic City. *Id.* However, the revenues derived must be applied to benefit the elderly and disabled. *Id.* Unlike the state lottery, the casinos are privately owned. *Id.* Judge Gibbons noted, however, the state does have a "direct financial stake" in casino operation because it imposes an eight percent tax on gross revenues. *Id.* at 822-23. Since the casinos are privately owned, the state did not argue that they fit within the gov-

recognized that the interests of the state and the casino owners were "closely aligned economically."[97]

Judge Gibbons then considered the enactment of the NLRA and the development of a federal labor law policy.[98] Because the drafters of section 7 were aware of labor racketeering, the court viewed the omission of union leadership qualifications as a conscious choice in favor of employees' free choice of collective bargaining representatives.[99] The *Danziger* court believed that *Hill v. Florida*, where the Supreme Court held that employee free choice could not be "frustrated by state legislation,"[100] provided the "defini-

---

ernment-employer exception of § 2(2) of the NLRA. *Id.* at 823 (citing 29 U.S.C. § 152(2) (1976)).

97. *Id.* at 823.

98. *Id.* at 823-24. Prior to expansive commerce power interpretations, Judge Gibbons explained, "[S]tate law interference with efforts of employees to choose their own collective bargaining representative was largely beyond the reach of congressional enactments." *Id.* at 823 (citing Adair v. United States, 208 U.S. 161 (1908) (invalidating federal statute making it unlawful to discriminate against employees because of union membership)). For a discussion of *Adair* and early commerce power interpretations, see notes 20-22 and accompanying text *supra*.

The court noted, however, that a 1930 United States Supreme Court decision held that the Railway Labor Act of 1916 was constitutional, and effectively overruled *Adair*, thus setting the stage for the modern era of labor relations laws. *Id.* at 823 (citing Texas & New Orleans R.R. Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548 (1930)). The first federal statute explicitly granting employees the right to bargain collectively through representatives of their own choosing, the court continued, was the National Industrial Recovery Act (NIRA). *Id.* After the NIRA, Congress enacted the NLRA which also granted employees the right to choose their own representatives. *Id.* However, the *Danziger* court noted that, while provisions in prior acts were "largely precatory" and contained "no effective enforcement mechanism," the NLRA made employee free choice and self-organization "a federal statutory right, the interference with which is an unfair labor practice which the National Labor Relations Board has the power to prevent." *Id.* at 823-24.

99. 709 F.2d at 823-29. The court concluded that the omission from the NLRA of any qualification provisions was intentional and therefore manifested Congress' desire to allow workers full freedom of choice in the selection of their representatives. *Id.* The Court explained as follows:

> When the NLRA was under consideration opponents of the legislation called to the attention of Congress the issue of labor racketeering. Thus Congress was not unmindful of the generic problem which Section 93 of the Casino Control Act now addresses in a specific industry. Despite these rather forceful expressions from opponents of the NLRA, however, the 74th Congress placed no limitations in section 7 or section 8 upon the persons who could be chosen as collective bargaining representatives. . . . [T]he omission of racketeering limitations on qualifications for designation as a collective bargaining representative plainly was a conscious legislative choice both in the 1933 NIRA and the 1935 NLRA.

Id. at 824 (footnote omitted). Congress, in the Labor Management Reporting and Disclosure Act of 1959 (LMRDA), has since set down various qualifications for union officerships one of which prohibits a person from holding office if he has been convicted of a felony within the last five years. *Id.* at 827 n.8 (citing 29 U.S.C. § 504 (1976)). For a discussion of the *Danziger* court's treatment of the LMRDA and how it relates to the preemption issue, see notes 107-11 and accompanying text *infra*.

100. 709 F.2d at 824 (quoting *Hill v. Florida*, 325 U.S. at 542). In addition to the substantive interference with employee § 7 rights, the court concluded that the Com-

tive interpretation of the preemptive effect of section 7."[101] Judge Gibbons drew from *Hill* the principle that states may not fix standards or qualifications for union officers which would preclude them from being chosen as bargaining agents.[102] Because this was precisely the effect of New Jersey's casino regulation, Judge Gibbons concluded that the "*Hill* Court's holding on the preclusive effect of section 7 [was] controlling . . . unless it ha[d] been modified by subsequent federal legislation or overruled by the Supreme Court."[103]

The *Danziger* court took note that Congress undertook major revision of the NLRA in 1947, three years after *Hill* was decided.[104] Although Congress amended both section 7 and section 8, it did not change the provisions regarding employee free choice of bargaining representative.[105] Judge Gibbons concluded that Congress' silence in this instance "must be considered [an] approval of the holding in *Hill* that state law on eligibility is preempted."[106] Further, the court found that cases subsequent to 1947 not only

---

mission's disqualification of the union officers was also preempted under the "primary jurisdiction" theory. *Id.* at 825. The court noted that the NLRB had already certified the union as the collective bargaining agent for casino employees and that the Commissions' action would "render the union ineffective as a bargaining agent unless it dismiss[ed] three key officers." *Id.* at 825. Since the NLRB has "exclusive authority" to certify union bargaining agents, the court concluded that any state action would interfere with that authority. *Id.* (citing 29 U.S.C. § 159 (1976)). For a discussion of the primary jurisdiction theory, see notes 51-57 and accompanying test *supra*.

101. 709 F.2d at 825 (citing *Hill v. Florida*, 325 U.S. at 542). The *Danziger* court also concluded that the Supreme Court had provided the definitive interpretation of the preemptive effect of § 8, which defines unfair labor practices that are to be exclusively enforced by the NLRB. *Id.* at 825 (citing Bethlehem Steel v. New York State Labor Relations Bd., 330 U.S. 767 (1947)). For a discussion of *Bethlehem Steel*, see note 21 *supra*.

102. 709 F.2d at 825 (citing *Hill v. Florida*, 325 U.S. at 545 (Stone, C.J., concurring)).

103. *Id.* at 825.

104. *Id.* (citing Labor Management Relations Act of 1947, Pub. L. No. 101, ch. 120, § 7, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. § 160(a) (1976))).

105. *Id.* The court noted that in the 1947 enactment of the LMRA, Congress had seen fit to amend various provisions of the NLRA. *Id.* Congress retained the first portion of § 7 guaranteeing to workers the freedom to choose their bargaining representatives, but added a correlative "right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)." *Id.* (quoting U.S.C. § 157 (1976)). The *Danziger* court further observed that Congress addressed the labor racketeering problem in the LMRA by making it unlawful for employers to pay, or for labor representatives to receive, money or other things of value. *Id.* at 826. The court found it significant that Congress did not set down qualifications for union leadership. *Id.* (citing 29 U.S.C. § 186 (1976)).

106. *Id.* at 826 (citing Merrill, Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353 (1982)). Judge Gibbons cited *Curran* for the proposition that when Congress amends certain sections, and leaves intact other provisions of a statute under which federal courts have implied a cause of action, this silence is itself evidence that Congress affirmatively intends to preserve that remedy. *Id.* (citing 456 U.S. at 374-82).

failed to modify *Hill*, but demonstrated a policy that a court had to find specific congressional deference to state regulation in a particular area before it could validate any state regulation of employee rights protected by the NLRA.[107]

Judge Gibbons observed that when Congress next dealt with the collective bargaining relationship in the LMRDA, it specifically addressed eligibility for union office.[108] In section 504 of the LMRDA, he noted that Congress prohibited anyone, who within five years had been convicted of a felony or who had been a member of the Communist Party, from holding union office.[109] The LMRDA did not expressly authorize state regulation of leadership qualifications, although it explicitly preserved state remedies in two other sections.[110] The *Danziger* court believed that the absence of a sav-

---

107. *Id.* at 825-27. In 1947 Congress, amended § 10 of the NLRA to permit the Board to cede jurisdiction to state agencies in certain instances, thus correcting the "no-man's land problem of NLRB declination of jurisdiction and state agency lack thereof." *Id.* at 825-26 (citing 29 U.S.C. § 160 (1976)). However, the Third Circuit emphasized that the Supreme Court had held that § 10 was "the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the [NLRB]." *Id.* at 826 (quoting Guss v. Utah Labor Relations Bd., 353 U.S. 1, 9 (1953)). Quoting from *Guss*, the *Danziger* court reasoned,

> "Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative."

Id. at 826 (quoting Guss v. Utah Labor Relations Bd., 353 U.S. 1, 9 (1953) (quoting Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Div. 998 v. Wisconsin Employment Relations Bd., 430 U.S. 383, 397-98 (1958))).

The *Danziger* court also noted that in the period between the 1947 amendments and the *Guss* decision, the Supreme Court had held that § 7 preempted both the strike-vote provisions of the Michigan Labor Mediation Law and the Wisconsin Public Utility Anti-Strike Law. *Id.* at 826 (citing Amagamated Ass'n of St. Employees, Div. 998 v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951); Automobile Workers v. O'Brien, 339 U.S. 454 (1950)).

Judge Gibbons further pointed out that five years after *Guss* the Supreme Court reiterated the authority of *Hill*, *O'Brien*, and *Wisconsin Employment Relations Board* when it held that a state court could not set aside a collective bargaining agreement even though it violated state antitrust laws. *Id.* at 826 (citing Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283, 296 (1959)). For a discussion of *Oliver*, see note 48 and accompanying text *supra*. Thus, the court concluded that "as federal law stood after the enactment of the LMRA, there could be no room for avoiding, in a case such as this, the binding authority of the *Hill* decision." 709 F.2d at 827.

108. 709 F.2d at 827 (citing 29 U.S.C. §§ 401-531 (1976)). For a discussion of the LMRDA, see notes 25-29 and accompanying text *supra*. Section 504 of the LMRDA prohibits convicted felons and members of the Communist Party from holding union office. *See* 29 U.S.C. § 504 (1976). For the text of section 504, see note 25 *supra*.

109. 709 F.2d at 827 (citing 29 U.S.C. § 504 (1976)).

110. *Id.* at 827-28 (citing 29 U.S.C. §§ 523(c), 524 (1976)). The court noted that LMRDA § 604 allows application of state criminal laws to union leaders and § 603(a) preserves state-law remedies for breaches of fiduciary duty. *Id.* The *Danziger* court noted that because many of the proscribed activities were already crimes under state law and not protected by § 7 of the NLRA, "Congress decreed in section

ings clause accompanying section 504 evinced a congressional intent that federal law alone should establish qualifications for union leadership, and that the rule in *Hill v. Florida* had been preserved.[111] Moreover, the court quoted the Senate Report on the LMRDA as an explicit statement that the section 504 qualification provision "is designed to further . . . [establish] certain standards for persons holding union office—a matter within the purview of the federal government."[112]

Judge Gibbons asserted that *Hill* represented the first of two preemption doctrines under federal labor law, that legislation bearing on protected employee activity was clearly preempted.[113] In both *Hill* and the present cases he noted, the challenged state law directly related to employee free choice in selection of bargaining representatives, a specifically protected

---

604 of the LMRDA that it would not 'impair or diminish the authority of any State to enact and enforce general criminal law. . . .' " *Id.* at 827 (citing 29 U.S.C. § 524 (1976)). According to the court, § 604

> was included in recognition of the holdings in *Garner v. Teamsters Union* . . . and *San Diego Building Trades Council v. Garmon* . . . that in the field of labor law pre-emption might apply not only with respect to activity protected by section 7, but also with respect to activity prohibited by a federal regulatory scheme. Those cases also influenced Congress to include in section 603(a) of the LMRDA a savings clause preserving state law remedies for breach of fiduciary duties.

Id. (citing 29 U.S.C. § 523(a) (1976)).

111. *Id.* at 828. The *Danziger* court explained as follows:

> [I]n 1959 Congress, fully aware of the holding in *Hill v. Florida* that section 7 preempted state disqualification laws, of the rule of statutory interpretation . . . that Congressional deference to state law must be specific, and of [Supreme Court] holdings that even state regulation of activity prohibited by federal law is preempted, chose to legislate on the subject of union officer disqualification with no deference to state authority, either with respect to parallel disqualification criteria or with respect to conflicting disqualification criteria. Since both disqualification and preemption were carefully considered in the same legislation no intention can be attributed to Congress other than preservation of the *Hill v. Florida* rule.

Id. (citations omitted). Thus, the Third Circuit concluded that the failure of either the Supreme Court or Congress to modify *Hill* indicated their affirmance of its rule. *Id.*

112. *Id.* at 828 (quoting S. REP. NO. 187, 86th Cong., 1st Sess. 2, *reprinted in* 1959 U.S. CODE CONG. & AD. NEWS 2318, 2366).

113. *Id.* at 828. The court stated that when activities are specifically protected by the NLRA, state law is necessarily preempted. *Id.* (citing San Diego Bldg. Trades Council v. Garmon, 349 U.S. 236, 244 (1959)). Judge Gibbons quoted the following rationale of the *Garmon* Court:

> Choice of a bargaining representative is totally protected by section 7, except to the extent that the bargaining representative may be disqualified under section 503(a) of the LMRDA. No section 504 LMRDA disqualification applies to this Union's officers. Thus there is neither occasion nor justification for engaging in weighing or balancing. State disqualification statutes which go beyond section 504 simply cannot operate in interstate commerce to disqualify otherwise eligible bargaining representatives.

Id. at 828-29 (quoting San Diego Bldg. Trades Council v. Garmon, 349 U.S. 236, 244 (1959)).

right under NLRA section 7.[114] Judge Gibbons felt that the second preemption doctrine, which balanced state and federal interests where the activity in question was federally regulated but not specifically protected, was inapplicable.[115] For this reason, the *Danziger* court did not believe that a consideration of the relative weight of New Jersey's interest in regulation of gambling was appropriate.[116]

The *Danziger* court rejected the Commission's argument that *DeVeau v. Braisted* impaired the authority of *Hill*, because the court regarded the explicit congressional approval of the state measures taken in *DeVeau* as the determinative factor, and one which distinguished it from the present case.[117]

Judge Gibbons also rejected the Commission's attempt to distinguish the regulation of a single industry of peculiarly local concern from the general regulation involved in *Hill*.[118] Even if section 93 were limited to a sin-

---

114. *Id.* at 828. For a discussion of the employee rights protected by § 7 of the NLRA, see notes 21-22 and accompanying text *supra*. The court found that the New Jersey Casino Control Act directly interfered with protected employee choice because it would disqualify one of the Union's officers for a prior conviction which was well outside of the five-year period provided by § 504 of the LMRDA. 709 F.2d at 828.

115. 709 F.2d at 828. Where the activities which a state purports to regulate are not specifically protected by § 7, but are nevertheless federally regulated, Judge Gibbons found that the Supreme Court had mandated "a case by case determination of the interaction between state and federal regulatory schemes." *Id.* (citing Farmer v. United Bhd. of Carpenters and Joiners, 430 U.S. 290 (1977) (state cause of action for intentional infliction of emotional distress not preempted by NLRA); Amalgamated Ass'n of St., Elec. Ry. and Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) (state law applied to union membership disputes preempted by NLRA); Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) (state cause of action for defamation not preempted by NLRA)).

116. *See id.* at 828-29. Judge Gibbons stated that the New Jersey disqualification provision was absolutely prohibited and "[t]here is neither occasion nor justification for weighing or balancing. State disqualification statutes which go beyond [LMRDA] section 504 simply cannot operate in interstate commerce to disqualify otherwise eligible bargaining representatives." *Id.*

117. *Id.* at 829 (citing *DeVeau v. Braisted*, 363 U.S. at 144). The court dismissed the contention that *DeVeau* overruled *Hill*, because it interpreted Congress' approval of the interstate compact involved in *DeVeau* as an approval of the state qualification provision passed incident thereto. *Id.* at 829. In addition, the court found it significant that in the plurality opinion in *DeVeau*, Justice Frankfurter, who had dissented in *Hill*, was "careful not to intimate that *Hill* was overruled." *Id.* For a discussion of *Hill* and *DeVeau*, see notes 61-74 and accompanying text *supra*.

118. 709 F.2d at 829. The Commission contended that *Hill* involved a statute applicable to all labor unions, while the qualification provision before the Third Circuit was limited to the casino industry and involved a matter of strong local concern. *Id.* The *Danziger* court noted, however, that the qualification provision was not limited to the casino workers but also applied to casino hotel employees, who do not actually work in the casinos. *Id.* In addition, the court found the strong local concern argument unpersuasive. *Id.* It asserted that a similar argument was raised and dismissed when the Supreme Court struck down a law preventing strikes against public utilities despite pleas that the local interest justified the law. *Id.* (citing Amalgamated Ass'n of St. Employees, Div. 998 v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1950)). For a discussion of *Amalgamated*, see note 47 *supra*.

gle industry, he reasoned, the state had not exercised its power to assign casino gambling to a political subdivision.[119] Although the state might in this way bring the industry within the government-employer exception to the NLRA, Judge Gibbons continued, "Congress has not . . . given the states the further option of deciding for themselves which areas of private enterprise can be so cloaked with the mantle of state interest as to be placed outside the preemptive scope of the NLRA."[120]

The Third Circuit next considered whether the qualification provision in section 93 of the New Jersey Casino Control Act was preempted by ERISA.[121] Judge Gibbons noted that section 514(a) of ERISA provides, with few exceptions, that ERISA shall supersede all state laws relating to employee benefit plans.[122] Since section 93 restricted the qualifications of administrators of "employee benefit plans"[123] within ERISA's coverage, the court quickly concluded that section 93 and ERISA could not "lawfully co-

---

119. *See* 709 F.2d 829-30 (citing 29 U.S.C. § 152(2) (1976) (government employers not subject to NLRA); NLRB v. Natural Gas Utility Dist., 402 U.S. 600 (1971) (utility district administered by persons responsible to public officials comes within government employer exception to the NLRA)). Judge Gibbons pointed out that New Jersey *had* exercised this option with respect to its lottery. *Id.* at 830 (citing N.J. STAT. ANN. 4:9-4 (West 1973)).

120. *Id.* at 830. The *Danziger* court refused to recognize the state's prerogative to specifically regulate the gambling industry simply on the basis that it "is uniquely attractive to unwholesome elements in our society." *Id.* Concern over organized crime, the court reasoned, could not be limited to gambling, because other industries of vital interest to the state, such as the solid waste industry, had been identified as susceptible to criminal infiltration. *Id.* at n.10. The court viewed organized crime as a national problem which Congress had addressed in criminal statutes and in allowing state criminal law to operate against union officials. *Id.* at 830 (citing 18 U.S.C. §§ 524, 1961-1968 (1982)). Judge Gibbons concluded, "That problem cannot be relied upon by the states to Balkanize the law with respect to choice of collective bargaining representatives in non-exempt interstate commerce." *Id.* at 830.

121. *Id.* at 830-31.

122. *Id.* at 830 (citing 29 U.S.C. § 1144 (1976)). Judge Gibbons noted that § 514 does not apply to preempt the following: (1) causes of action arising before January 1, 1975 (effective date of ERISA); (2) state laws regulating insurance, banking, or securities; and (3) any generally applicable criminal law of a state. *Id.* (citing 29 U.S.C. §§ 4144(a)(1), (2)(A)(4) (1976)). The *Danziger* court noted that the Third Circuit had previously held that "the legislative history of ERISA's preemption section . . . make[s] plain that the preemptive intent is just as broad as its language suggests." *Id.* at 830 (quoting Buczynski v. General Motors Corp., 616 F.2d 1238, 1250 (3d Cir. 1980), *aff'd sub nom.* Alessi v. Raybestos-Manhatten, Inc., 451 U.S. 504 (1981)).

123. *Id.* at 830-31. The *Danziger* court dismissed the Commission's assertion that the qualification provision did not "relate to any employee benefit plan," finding that the "plain language" of the provision precluded any such contention. *Id.*

Judge Gibbons further stated that ERISA provides that state statutes relating to employee benefit plans "are preempted even when their effect is indirect." *Id.* at 831 (citing 29 U.S.C. § 1144(c)(2) (1976)). Moreover, he noted, the Supreme Court has "definitively construed" ERISA's preemption sections as precluding the states " 'from avoiding through form the substance of the preemption provision.' " *Id.* (quoting Alessi v. Raybestos-Manhatten, Inc., 451 U.S. 504, 525 (1981)).

exist."[124]

Having found that the union's preemption claims were meritorious, the court turned to the question of whether the request for preliminary injunctive relief should have been granted.[125] Judge Gibbons found that there had been a strong likelihood that the union would ultimately succeed on the merits,[126] a strong likelihood of harm *pendente lite* to the Union's status as a collective bargaining representative,[127] no likelihood that commensurate harm to the defendant would have resulted from the grant of *pendente lite* relief,[128] and a strong national public interest in preventing the unlawful exercise of state agency jurisdiction in a preempted area.[129] Therefore,

---

124. *Id.* at 831.

125. *Id.* Judge Gibbons stated that federal standards for preliminary injunctive relief were clear:

> They include the likelihood of the moving party succeeding on the merits at final hearing, the likelihood of irreparable harm to the moving party *pendente lite* if no relief is granted, the possibility of harm to other interested parties from the grant of such relief, and the public interest.

Id. (citing Constructors Ass'n v. Kreps, 573 F.2d 811, 815 (3d Cir. 1978); Oburn v. Shapp, 521 F.2d 142, 147 (3d Cir. 1975)).

126. *Id.* at 831. Judge Gibbons referred to earlier portions of the *Danziger* opinion to satisfy this element: "Since section 93 cannot coexist with section 7 of the NLRA and section 514 of ERISA, the district court should have recognized that sooner or later the Union's objection . . . must prevail." *Id.*

127. Id. at 831-32. Defining irreparable harm *pendente lite* as "includ[ing] at least that kind of harm which cannot be rectified after final hearing by an award of money damages," the *Danzinger* court found this element satisfied by the threatened deprivation of dues revenues under the Commission's order. *Id.* Had the disqualifying order gone into effect, the Union either would have been financially unable to carry on its collective bargaining responsibilities or it would have been forced to remove the officers. *Id.* at 831. The court ruled that

> [i]n neither case would it be possible, long after the event, to measure in money and compensate for the harm to the ongoing collective bargaining relationship from intangibles such as erosion of members' confidence in their chosen collective bargaining organization, delay in the process of grievances or disruption of internal union affairs.

Id.

128. *Id.* The court found that there were ample means available to the state to maintain casino integrity without need for disqualifying duly certified bargaining representatives. *Id.*

129. *Id.* at 832. The court recognized a "clear national public interest in preventing erosion of the exclusive role of § 7 in determining collective bargaining representatives." *Id.* The court found that the public interest in precluding state interference in matters in "the exclusive preserve of the Board" was evident in two Supreme Court cases which recognized the Board's option to seek injunctive relief against state action both before and after the General Counsel has filed a charge. *Id.* (citing NLRB v. Nash-Finch Co., 404 U.S. 138 (1971); Capitol Service, Inc. v. NLRB, 347 U.S. 501 (1954)).

The *Danziger* court then addressed the Commission's contention that the district court should have abstained from hearing the case. *Id.* at 832 (citing Younger v. Harris, 401 U.S. 37 (1971); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941)). The Third Circuit was unpersuaded by the Commission's argument under *Pullman*, noting that *Pullman* abstention would have required the district court to retain jurisdiction while a narrowing construction of § 93, which might avoid the constitutional adjudication, was

Judge Gibbons concluded, the district court should have granted a preliminary injunction against the enforcement of section 93, pending a final hearing on its validity.[130]

Judge Becker, writing separately, concurred with that portion of the majority's opinion which held that the regulation of pension and welfare fund management under the Casino Control Act was preempted by ERISA.[131] However, he dissented from the panel's holding on NLRA preemption, criticizing the majority for fashioning a "sweeping" preemption doctrine from federal labor law that "appears to leave no room for state regulation that affects section 7 rights."[132] Judge Becker argued that unless federal regulation expressly precludes state regulation, its preemptive effect is not absolute.[133] Where Congress does not explicitly state an intent to pre-

---

sought from a New Jersey tribunal. *Id.* at 832. Judge Gibbons explained that the questions presented by the qualification provisions were "neither technical nor complex" and that the Commission "never suggested any construction of section 93 which could avoid deciding the preemption issue." *Id.* Thus, the court concluded that *Pullman* abstention would have been an "exercise in futility." *Id.* The court also rejected the Commission's arguments under *Burford*, stating that "no argument can be entertained based on disruption of a state administrative scheme in a case in which the court is asked to decide whether the very existence of that scheme violates a paramount federal statute." *Id.* Finally, the court dismissed the Commission's *Younger* argument on the grounds that "absent federal district court intervention," the "final judgment rule" would permit state agency orders operating as "prior restraints upon the exercise of federally protected rights" to "escape any federal appellate review for long periods." *Id.* (citing 28 U.S.C. § 1257 (1976)).

130. *Id.* at 833. The court dismissed the union's overbreadth and vagueness challenges because resolution of the preemption issues were sufficient to dispose of the appeal. *Id.* (citing Hagans v. Lavine, 415 U.S. 528 (1974)).

On June 30, 1984, the full Third Circuit denied a request by the Commission pursuant to Fed. R. App. P. 35(b) that the case be reheard *en banc*. Hotel and Restaurant Employees, Local 54 v. Danzinger, Nos. 82-5210, 82-5234 and 82-5260 (3d Cir. June 30, 1983). Circuit Judge Arlin M. Adams filed a written statement explaining his vote to reject the request:

> Given the magnitude of a state's interest in regulating an industry such as the casino industry, and the contention vigorously advanced that such regulation does not inexorably stand as an obstacle to the purposes and objectives of the Congress in the labor area, whether the [NLRA] preempts a provision such as section 93 . . . would seem a question worthy of full exploration by the Supreme Court.

Id., slip op. at 3.

131. 709 F.2d at 833 (Becker, J., concurring in part and dissenting in part). Judge Becker regarded ERISA's explicit statement of intent as "superseding any and all State laws insofar as they . . . relate to any employee benefit plan . . ." as a rare but unmistakeable indication of intent to usurp a particular field of regulation. *Id.* at 836 (Becker, J., concurring in part and dissenting in part) (citing 29 U.S.C. § 1144 (1976)).

132. *Id.* at 835 (Becker, J., concurring in part and dissenting in part). Judge Becker asserted that the preemption doctrine was far from absolute, and that the importance of the local concern in this instance was critical to a determination of whether § 93 constituted an impermissible intrustion into federally protected rights. *Id.* at 835-36 (Becker, J., concurring in part and dissenting in part).

133. *Id.* at 836-37 (Becker, J., concurring in part and dissenting in part). Judge Becker characterized the majority's view that where activity is specifically protected

empt state regulation, he felt that the appropriate test was that articulated by the Supreme Court in *Local 926 v. Jones*.[134] Judge Becker contended that in order for the court properly to determine the implicit preemptive scope of a federal statute, it "must examine thoroughly the purposes and policies of the federal scheme and the extent to which state regulation would be incompatible."[135]

Judge Becker stated that the first question under the *Jones* analysis was whether Congress intended section 7 to preempt all attempts by states to impose criteria on whom employees may select as their bargaining representatives.[136] He criticized the majority's characterization of *Hill v. Florida* as controlling on this issue.[137] Judge Becker asserted that Congress, both by

---

by § 7, state regulation is absolutely prohibited as "inaccurate" and "oversimplified." *Id.* He stated that a court should reach a conclusion that an area is absolutely preempted by federal law only where Congress expresses its intent explicitly in the statute or unmistakeably in the legislative history. *Id.* at 836 (Becker, J., concurring in part and dissenting in part) (citations omitted).

134. *Id.* at 837 (Becker, J., concurring in part and dissenting in part) (citing *Jones*, 103 S. Ct. at 1458-59). According to Judge Becker, *Jones* maintains that state laws are ordinarily preempted if they regulate conduct arguably protected by the NLRA unless the strong local concern justifying the regulation outweighs the harm to the federal regulatory scheme caused by the state statute. *Id.* (citing 103 S. Ct. at 1458-59). Judge Becker argued that, in light of the fact that § 7, unlike ERISA, contained no express preemptory provisions, the majority was incorrect in concluding that there was neither occasion nor justification for engaging in weighing or balancing. *Id.* at 837 n.4 (Becker, J., concurring in part and dissenting in part).

135. *Id.* at 837 (Becker, J., concurring in part and dissenting in part) (citing *DeVeau v. Braisted*, 363 U.S. at 153). Since § 7 of the NLRA does not "wear [its] preemptive nature on its sleeve," Judge Becker considered the weighing and balancing approach taken by the *Jones* Court to be the appropriate standard for determining the preemptive scope of § 7. *Id.* at 836-37 (Becker, J., concurring in part and dissenting in part). Judge Becker quoted the analysis he felt the *Jones* Court had mandated:

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA . . . . [If so], otherwise applicable state law and procedures are ordinarily preempted . . . . When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulation or sanction of the conduct . . . . The question of whether regulation should be allowed because of the deeply rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the Board's exclusive jurisdiction or in terms of conflicting substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens.

Id. at 837 (Becker, J., concurring in part and dissenting in part) (quoting *Jones*, 103 S. Ct. at 1458-59).

136. *Id.*

137. *Id.* at 836-37 (Becker, J., concurring in part and dissenting in part). Judge Becker asserted that the majority was incorrect in concluding that *Hill v. Florida* controlled this case and required the conclusion that § 93 was preempted. *Id.* at 838 (Becker, J., concurring in part and dissenting in part). According to Judge Becker, the purpose of the Florida statute at issue in *Hill* was to regulate *all* labor unions in

enacting the LMRDA and by approving the *DeVeau* compact, evinced an intent to allow state-imposed eligibility requirements in certain circumstances.[138] He argued that it was futile to attempt to discern a preemptory intent from the LMRDA, since it was sprinkled with both savings and preemption provisions.[139] Judge Becker stated that just as it was possible for the majority to conclude that Congress intended to preempt state law by failing to include a savings provision in section 504, it was equally plausible that Congress did *not* intend to preempt since it also failed to include a *preemption* provision.[140] Judge Becker also argued that since one of the factors motivating Congress to enact the LMRDA was the inability of the states to control criminal infiltration of labor unions, it would be reasonable to interpret more restrictive state eligibility requirements as "complementing the federal scheme."[141]

Similarly, Judge Becker asserted that *DeVeau v. Braisted* indicated that

---

the state. *Id.* at 839 (Becker, J., concurring in part and dissenting in part). He noted that § 93, on the other hand, regulated only those unions representing members working in the casino industry. *Id.* Moreover, Judge Becker asserted that § 93 was part of a state statute, which, unlike *Hill*, was not labor oriented. *Id.* Thus, he concluded that "*Hill's* rejection of Florida's attempt to establish qualifications for all union officials does not lead inexorably to the conclusion that the legislation here at issue is also inconsistent with congressional intent." *Id.* (footnote omitted).

Judge Becker also rejected the majority's assertion that Congress' approval of *Hill* was manifested by its twice having enacted, with knowledge of *Hill*, major labor legislation without overruling it. *Id.* at 840 (Becker, J., concurring in part and dissenting in part). Judge Becker criticized the majority for "rely[ing] too heavily" on *Curran*, by failing to recognize that congressional inaction was only *evidence* of acquiescence, and that *Curran*'s formulation was adopted in a much simpler context. *Id.* 840-41 (Becker, J., concurring in part and dissenting in part) (citing Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)). For a discussion of the majority's application of *Curran*, see note 106 and accompanying text *supra*.

138. 709 F.2d at 843-45 (Becker, J., concurring in part and dissenting in part). For a discussion of the LMRDA, see notes 25-29 and accompanying text *supra*. For a discussion of *DeVeau*, see notes 67-73 and accompanying text *supra*.

139. 709 F.2d at 841-43 (Becker, J., concurring in part and dissenting in part). Judge Becker found that while LMRDA sections 603(a) and 604 contain clauses preserving state remedies, section 483 is "expressly preemptive." *Id.* at 841-42 (Becker, J., concurring in part and dissenting in part). Thus, Judge Becker regarded as ill-reasoned the majority's inference of preemptive intent from the omission of a savings clause in § 504. *Id.* For the pertinent portion of the majority's reasoning, see notes 108-12 and accompanying text *supra*.

140. 709 F.2d at 842 (Becker, J., concurring in part and dissenting in part). In addition, Judge Becker asserted that the majority had incorrectly concluded that § 603(a) of the LMRDA was limited to the preservation of state law remedies for breach of fiduciary duty. *Id.* Judge Becker noted that the Supreme Court in *DeVeau* had broadly interpreted § 603(a) as "an express disclaimer of pre-emption of state laws *regulating the responsibilities of union officials*, except where such preemption is expressly provided . . . ." Id. at 843 (Becker, J., concurring in part and dissenting in part) (quoting *DeVeau*, 363 U.S. at 157) (emphasis added). For a discussion of *DeVeau*, see notes 67-73 and accompanying text *supra*. For a discussion of the LMRDA, see notes 25-29 and accompanying text *supra*.

141. 709 F.2d at 843 (Becker, J., concurring in part and dissenting in part) (citation omitted). For a discussion of the LMRDA's legislative history, see notes 25-27 and accompanying text *supra*.

Congress did not view all state eligibility requirements as inimical to federal regulation of labor relations.[142] Judge Becker noted that the four-Justice plurality in *DeVeau* began its preemption analysis by inquiring whether Congress would find that restriction of leadership eligibility in the waterfront industry frustrated national labor policy.[143] He reasoned that since the *DeVeau* plurality thought such an inquiry was necessary, the four Justices had rejected any inference that Congress intended an automatic "blanket" preemption of all state legislation relating to employee choice of bargaining representatives.[144] To the contrary, Judge Becker found that *DeVeau* exemplified Congress' approval of state eligibility requirements which were justified by strong local concerns.[145] He noted that "Congress apparently perceived the problem of labor corruption on the waterfront to be of sufficient severity that state regulation would not be inimical to federal labor policy."[146]

---

142. 709 F.2d at 843-46 (Becker, J., concurring in part and dissenting in part) (citing *DeVeau*, 363 U.S. at 144). For a discussion of *DeVeau*, see notes 67-73 and accompanying text *supra*.

143. 709 F.2d at 844 (Becker, J., concurring in part and dissenting in part). Judge Becker invoked the *DeVeau* plurality's characterization of the issue as

> whether we may fairly infer a congressional purpose incompatible with the . . . restrictions upon the choice of a bargaining representative embodied in § 8 of the New York Waterfront Commission Act. Would Congress, with a lively regard for its own federal labor policy, find in this state enactment a true, real frustration . . . of that policy?

Id. (quoting *DeVeau*, 373 U.S. at 153). While he recognized that congressional approval of the Waterfront Commission Compact facilitated the Court's decision in *DeVeau*, Judge Becker felt that the *DeVeau* plurality's "formulation strongly implies that a court without access to similarly conclusive extrinsic evidence nevertheless should attempt to determine whether Congress would have intended to preclude the particular state legislation at issue." *Id.* at 844 (Becker, J., concurring in part and dissenting in part).

144. *Id.* Moreover, Judge Becker asserted that *DeVeau* is important for "the insight it provides courts trying to 'imaginatively summon the likely reaction of Congress' " to state laws establishing requirements for union officials. *Id.* (quoting *DeVeau*, 363 U.S. at 153).

145. *Id.* at 844-45 (Becker, J., concurring in part and dissenting in part). Judge Becker quoted the report of the House Judiciary Committee which expressly noted that " '[t]he compact to which the committee here recommends that Congress grant its consent is in no sense antilabor legislation, but rather, antiracketeering legislation.' " *Id.* at 845 (Becker, J., concurring in part and dissenting in part) (quoting H.R. REP. NO. 998, 83rd Cong., 1st Sess. 6 (1953)). Judge Becker pointed out that Justice Frankfurter's opinion in *DeVeau* distinguished *Hill* on the grounds that *Hill* involved a broad regulation of labor, while *DeVeau* dealt with a crime prevention program. 709 F.2d at 844 (Becker, J., concurring in part and dissenting in part) (quoting *DeVeau*, 363 U.S. at 155) (plurality opinion of Frankfurter, J.). Justice Frankfurter had written, "It is instructive that this unique provision has occurred in connection with approval of a compact dealing with the *prevention of crime* where, because of the *peculiarly local nature of the problem, the inference is strongest that local policies are not to be thwarted.*" *Id.* (quoting *DeVeau*, 363 U.S. at 15 (plurality opinion of Frankfurter, J.)) (emphasis added).

146. *Id.* at 845 (Becker, J., concurring in part and dissenting in part). Judge Becker explained:

> I do not suggest that *DeVeau* compels the conclusion that the NLRA does

Having concluded that Congress did not intend section 7 to preempt all state laws establishing eligibility requirements for bargaining representatives, Judge Becker undertook the second inquiry under *Jones*: whether section 93 was intended to address the type of deeply-rooted local concern which justified state regulation of section 7 activity.[147] Judge Becker concluded that the legitimacy of New Jersey's interest in controlling crime in the casino industry was "beyond dispute,"[148] and so deeply rooted as to justify any resulting intrusion upon section 7 rights.[149]

---

not preempt section 93 of the Casino Control Act; certainly the absence of a majority opinion there, and of a congressionally approved compact here, would undercut any such argument. At the same time, *DeVeau* cannot be written off solely because it involved a compact, especially since the most plausible interpretation of its underlying scenario is that Congress did not view all state regulation of the qualifications of union officials as incompatible with the overall federal regulatory scheme. The fact that the LMRDA does not preclude the states from enacting more stringent criteria than are embodied in section 504 supports that conclusion.

Id. (footnote omitted).

147. *Id.* at 846-49 (Becker, J., concurring in part and dissenting in part). For a discussion of *Jones*, see notes 58-60 and accompanying text *supra*.

148. 709 F.2d at 846-49 (Becker, J., concurring in part and dissenting in part). Judge Becker cited numerous reports and studies which established a clear connection between organized crime and gambling. *Id.* Judge Becker quoted one commentator who explained that gambling was attractive to organized crime for two reasons:

> First, a casino contains a vast amount of liquid assets in the form of cash and gaming chips which are very attractive and susceptible to misappropriation. Second, these liquid assets remain uncounted and unrecorded as the gaming activity takes place. Casinos are unique because millions of dollars are continually changing hands among thousands of people on the casino floor without any record being made of how much money is exchanged, how many people are involved, or who those individuals are.

Id. at 846 (Becker, J., concurring in part and dissenting in part) (quoting Santaniello, *Casino Gambling: The Elements of Effective Control*, 6 SETON HALL LEGIS. J. 23, 23 (1982) (footnote omitted)). Several reports commissioned by the state concluded that "only the most stringent of gambling control laws can thwart the infiltration of casinos and related services and suppliers by organized crime." *Id.* at 847 (Becker, J., concurring in part and dissenting in part) (quoting STATE COMM'N OF INVESTIGATION, REPORTS AND RECOMMENDATION ON CASINO GAMBLING II (1977)). It was with this knowledge, Judge Becker stated, that the New Jersey legislature enacted the Casino Control Act. *Id.* at 848 (Becker, J., concurring in part and dissenting in part). The legislature sought to prevent "criminal elements from gaining a foothold in the industry" by creating the Casino Control Commission and the Division of Gaming Enforcement to "insure the integrity of the casino industry." *Id.* at 848-49 (Becker, J., concurring in part and dissenting in part). Judge Becker explained as follows: "Given the unique nature of the industry—in particular its tremendous, unmonitored cash flow and its consequent attractiveness to organized crime—the concerns of the legislature and citizenry cannot be characterized as anything less than 'deeply rooted in local feeling and responsibility.' " *Id.* at 849 (Becker, J., concurring in part and dissenting in part) (quoting *Jones*, 103 S. Ct. at 1459).

149. *Id.* at 849-51 (Becker, J., concurring in part and dissenting in part). Judge Becker reasoned as follows:

> [C]ongress' acquiescence in the legislation at issue in *DeVeau* suggests a congressional perception that, in situations where the threat to the welfare to the state is so persuasive and so well-documented that the need for comprehensive state regulation is manifest, such regulation will be permissible even

In reviewing the Third Circuit's decision in *Danziger*, it is submitted that the majority employed conclusory reasoning inconsistent with Supreme Court preemption analysis[150] to hold that New Jersey was precluded from regulating its casino gambling industry in any manner which affected employee rights under section 7 of the NLRA.[151] In assuming that employees' freedom to choose bargaining representatives is absolutely protected, it is submitted that the majority misconstrued congressional intent and disregarded Supreme Court precedent which mandates weighing of interests.[152]

Congress had recognized that section 7's protection of employee free choice is not absolute. In enacting the LMRDA, Congress recognized the need to control labor corruption through certain limited restrictions on employee choice in union leadership.[153] Moreover, Congress has specifically considered and *rejected* the argument that imposing qualifications for union office is *per se* inconsistent with section 7.[154] By authorizing New York to enact whatever implementing legislation it deemed necessary to deal with criminal infiltration of the waterfront industry, Congress gave a clear signal that section 7 was not an absolute protection.[155]

---

if it includes a component that directly restricts section 7 rights. I believe such situations to be rare, but I believe that one is presented here.

Id. at 849-50 (Becker, J., concurring in part and dissenting in part) (footnote omitted). Judge Becker explained further that the Casino Control Act was limited solely to casino employees and that the officials were not prevented from holding office in other locals within the same union. *Id.* Moreover, he concluded that New Jersey's legislation was not a display of anti-union animus, but was rather a "conscientious and well-reasoned attempt to erect a breakwater against a tide of vice and corruption that could engulf Atlantic City's casinos." *Id.* at 851 (Becker, J., concurring in part and dissenting in part).

150. For a discussion of Supreme Court preemption analysis, see notes 32-44 and accompanying text *supra*.

151. *See* 709 F.2d at 828.

152. *See Jones*, 103 S. Ct. at 1458-59; *DeVeau*, 363 U.S. at 152. The Court in *DeVeau* explained, "The doctrine of preemption does not present a problem in physics but one of adjustment because of the interdependence of federal and state interests and of the interaction of federal and state powers." 363 U.S. at 152.

153. *See* 709 F.2d at 841 (Becker, J., concurring in part and dissenting in part). Judge Becker noted that by enacting the LMRDA, "Congress . . . has established that the choice is no longer unfettered and that national labor policy admits of some such limitations." *Id.* The *DeVeau* Court explained that by imposing its own qualification provisions, Congress has given evidence that it does not view similar state restrictions as "incompatible with its labor policies." 363 U.S. at 156. The *DeVeau* Court also recognized that consistent with congressional approval of restrictions on employee free choice, Congress has not immunized union officials from operation of state criminal or fiduciary obligation laws and has permitted removal of officers who have breached these state-imposed responsibilities. *Id.* at 57.

154. *See DeVeau*, 363 U.S. at 150-52. The Waterfront compact implicated in *DeVeau* was approved by Congress despite objections by organized labor that state-imposed eligibility requirements interfered with employees' § 7 rights. *Id.*

155. *See id.* at 150-52. The Court noted that Congress was aware of union contentions that state-imposed restrictions would interfere with employee § 7 rights, but rejected the argument on the basis that such restrictions were required to control crime, corruption, and racketeering on the waterfront of the port of New York. *Id.* Judge Becker explained that "Congress apparently perceived the problem of labor

The Supreme Court's analysis of federal labor policy and the extent to which state regulation interfered with that policy in *DeVeau v. Braisted* indicated that section 7 was not intended to have an automatic or absolute preemptive effect.[156] Rather, the Court has required a balancing of state and federal interests[157] and, for provisions designed to control crime, the "inference is strongest that local policies are not to be thwarted."[158]

It is further submitted that New Jersey's interest in maintaining the integrity of casino operations is a significant local concern. Although the *Danziger* majority characterized organized crime as a national problem,[159] the Supreme Court has identified this state interest as "peculiarly local" and a justification for state intervention.[160] Judge Becker cited numerous reports detailing the susceptibility of gambling to infiltration and control by organ-

---

corruption on the waterfront to be of sufficient severity that state regulation would not be inimical to federal labor policy." *Id.* at 845 (Becker, J., concurring in part and dissenting in part).

156. 363 U.S. at 152-53. The Court stated that its task was to determine whether Congress would find in the state law a frustration of national labor policy, and that in the case *sub judice* Congress' consent to the compact only made their job easier. *Id.* at 153. The Court explained that the mere presence of state restrictions on employee free choice "does not settle the issue of preemption" and that the NLRA "does not exclude every state policy that may restrict employee free choice." *Id.* at 152. Judge Becker explained that the *DeVeau* Court "expressly recognized the importance of considering the particular situation and regulation at issue, rather than adopting a blanket approach to the preemption question." 709 F.2d at 844 (Becker, J., concurring in part and dissenting in part).

157. For a discussion of Supreme Court decisions requiring weighing of interests, see note 60 and accompanying text *supra*. As recently as 1983, the Court has reaffirmed the position that a balancing of state and federal interests on a case-by-case basis is necessary where state laws implicate § 7 protections. *See Jones*, 103 S. Ct. at 1458-59.

158. *See DeVeau*, 363 U.S. at 154. The Court has stated that "the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relevant impact of such a jurisdictional bar on the various interests affected." *Sears*, 436 U.S. at 180. It should be noted that the Supreme Court decision in *San Diego Building Trades Council v. Garmon*, which the *Danziger* majority cited in support of its conclusion that the total protection afforded employee free choice makes consideration of the local interest unnecessary, is the case most often credited with developing the "deeply rooted" local interest exception to federal labor law preemption. *See Jones*, 103 S. Ct. at 1458-59 (citing *Garmon*, 359 U.S. at 236). *See also* R. GORMAN, *supra* note 20, at 779. For a discussion of *Garmon*, see notes 52-53 and accompanying text *supra*.

159. 709 F.2d at 832. The *Danziger* court quickly dismissed the local-concern argument by asserting that other industries, such as the solid waste industry, were also susceptible to infiltration by organized crime. *Id.* at 830 & n.10. The court contended that the problem of organized crime is one of national concern that has been addressed by Congress in both federal criminal statutes and by provisions permitting state criminal laws to operate against union leaders. *Id.* at 830. Allowing states more leeway would, according to the majority, "Balkanize the law with respect to choice of collective bargaining representatives in non-exempt interstate commerce. *Id.*

160. *See DeVeau*, 363 U.S. at 144. The *DeVeau* Court explained that crime control is a significant local interest and that "because of the peculiarly local nature of

ized crime.[161] Moreover, criminal control of labor unions serving the casino industry is of particular concern to state governments given the opportunities of labor organization officials to manipulate large sums of money and exert self-serving pressure on casino owners with threats of labor strife.[162]

It is also submitted that the Third Circuit majority avoided interest-balancing by an unwarranted extension of *Hill v. Florida*.[163] It is submitted

---

the problem, the inference is strongest that local policies are not to be thwarted." *Id.* at 154.

161. For a discussion of these reports, see notes 148-49 and accompanying text *supra*. *See also* Philadelphia Inquirer, October 12, 1983, § A3, cols. 2-5 (recent indictment of 15 individuals, including several reputed bosses of organized crime, charged with "skimming" nearly $2 million in profits from Las Vegas casinos).

162. 709 F.2d at 846-49 (Becker, J., concurring in part and dissenting in part). The potential dangers of criminal control over labor unions are grave. One journalist has expressed fears that

> [i]f the state of New Jersey is to have no say whatever in who shall represent casino employees in contract negotiations and other union matters, even to the extent of being unable to bar union officials on grounds of ties with organized crime, then the entire casino business in Atlantic City might just as well be turned over to the mob without further argument.
>
> The mob would be in full control. That control would extend beyond the gambling halls to government and business in Atlantic City—and would contaminate political and economic apparatus throughout the state.

Philadelphia Inquirer, July 11, 1983, at A10, col. 1. It appears that fear of criminal infiltration into labor unions is well founded. *See* Philadelphia Inquirer, April 15, 1984, at A1, cols. 1-2 (allegation that several Local 54 officials including President Gerace funnelled campaign contributions from organized crime members to former Atlantic City Mayor Michael Mathews); *id.*, Sept. 21, 1983, at B4, cols. 1-6 (Senate investigating subcommittee presented evidence that nearly one third of the $1.5 million paid by employees into Local 54's dental plan had been diverted to "a reputed associate of Philadelphia organized crime figures"); *Id.*, April 7, 1983, at B6, col. 1 (indictment of Frank Gerace, President of Local 54, and two construction company officials charged with embezzling $31,000 in union funds by inflating renovation costs at union buildings).

163. *See* 709 F.2d at 823-28. The *Danziger* majority characterized *Hill* as controlling on the preclusive effect of § 7 "unless modified by subsequent federal legislation or overruled by the Supreme Court." *Id.* at 825. The court construed congressional silence after *Hill* as a ratification of its holding and an accurate indication of congressional intent. *Id.* at 825-28. For a discussion of *Hill*, see notes 62-66 and accompanying text *supra*. For a discussion of the majority's reasoning, see notes 100-07 and accompanying text *supra*. Judge Becker explained, however, that "congressional inaction is only evidence of congressional acquiescence; neither in *Curran* nor elsewhere has the Supreme Court said that such inaction resolves the question of congressional intent." 709 F.2d at 840 (Becker, J., concurring in part and dissenting in part) (citing Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 382-88 (1982)). In addition, the *Danziger* majority found it persuasive that Congress did not attach a savings provision to section 504 of the LMRDA when it had done so for other provisions. *Id.* at 827-28. However, Congress also failed to include a preemption provision as it had done for other sections of the Act. *Id.* at 842 (Becker, J., concurring in part and dissenting in part). From this, Judge Becker concluded that it was possible to "draw an inference at least as strong as the majority's, that Congress intended to preempt only when it did so explicitly." *Id.* Moreover, Judge Becker reasoned that, in reality, the erratic allocation of savings and preemption provisions in the LMRDA made "futile any attempt to divine congressional intent from the absence of a savings clause in section 504." *Id.*

that the court should have acknowledged that *Hill* involved a state's attempt to impose a sweeping general regulation of labor relations, unjustified by any peculiar state concern.[164]

In addition, the majority improperly limited *DeVeau* to its unique procedural facts.[165] It is suggested that *DeVeau* bears a strong factual resemblance to the regulation under consideration and would be a better basis for discussion in this case. First, both the New York regulation in *DeVeau* and the New Jersey regulation presented in *Danziger* were narrowly tailored to affect a specific local industry as opposed to the general regulation implicated in *Hill*.[166] Further, New York and New Jersey were motivated by the same perceived need for intervention in their target industries because of their peculiar susceptibility to organized crime,[167] a concern which the Supreme Court has regarded as "peculiarly local."[168]

Finally, it is submitted that Judge Becker properly distinguished the express preemptive language of ERISA from the general protections of section 7,[169] deeming the latter to require interest balancing.[170] Had the ma-

---

164. *See id.* at 839 (Becker, J., concurring in part and dissenting in part). Judge Becker asserted that the difference in scope of the two statutes necessitated different treatment:

> The central distinction between *Hill* and that case concerns the challenged laws themselves. The Florida statute at issue in *Hill* did nothing but establish qualification for the officials of *all* labor unions in the state. Apparently, the state's sole purpose was the regulation of labor unions in the state. Section 93 of the Casino Control Act, by contrast, does not seek to regulate all unions, but only those members working in the casino industry. Moreover, section 93 is part of a larger regulatory scheme whose purpose is by no means labor-oriented. Thus *Hill*'s rejection of Florida's attempt to establish qualifications for all union officials does not lead inexorably to the conclusion that the legislation here at issue also is inconsistent with congressional intent.

Id. (footnote omitted) (emphasis in the original).

165. *See id.* at 828. The court found it significant that Justice Frankfurter responded to arguments by a union official that the compact interfered with § 7 by stating that Congress' intent was clear given its specific approval of the compact. *Id.* (citing *DeVeau*, 363 U.S. at 153). Judge Becker noted, "*DeVeau* cannot be written off solely because it involved a compact, especially since the most plausible interpretation of its underlying scenario is that Congress did not view all state regulation of the qualifications of union officials as incompatible with the overall federal regulatory scheme." *Id.* at 845 (Becker, J., concurring in part and dissenting in part).

166. For a discussion of the facts of *DeVeau*, see notes 67-70 and accompanying text *supra*. For the text of § 93, see note 91 and accompanying test *supra*.

167. *See DeVeau*, 363 U.S. at 147-50 (purpose of compact was to control crime and corruption on the waterfront of the port of New York). *See* N.J. STAT. ANN. § 5:12-1(b)(6) (West Supp. 1983) (purpose of Casino Control Act is to maintain public confidence and trust in the credibility and integrity of the regulatory process and of casino operations).

168. For a discussion of the Court's characterization, see notes 160 and accompanying text *supra*.

169. *See* 708 F.2d at 836-37 (Becker, J., concurring in part and dissenting in part). Unlike ERISA, § 7 contains no explicit statements regarding its preemptive scope. For the text of ERISA's preemption provision, see note 75 and accompanying text *supra*. Judge Becker explained that § 7 does not wear its "preemptive nature on

jority conducted the weighing of interests mandated by *Jones* and *DeVeau*, it is suggested that it would have concluded, as Judge Becker did, that section 93 of the Casino Control Act is not inconsistent with federal protection of employee rights.[171]

The most dramatic potential impact of *Danziger* is that its invalidation of minimal state control over the qualifications of union officials may expose casino operations to infiltration by organized crime.[172] Moreover, by employing a preemption analysis which ignores the local interest, the Third Circuit has adopted a position which has not generally been espoused by the Supreme Court.[173] Since this precedent may influence lower courts to invalidate state laws without giving adequate consideration to the legitimate local concerns which prompted their enactment, it is urged that the Supreme Court reverse the NLRA aspect of the Third Circuit's decision, and set forth a clear standard to aid lower courts confronted with NLRA preemption questions.

Andrew Bramnick

---

its sleeve" and it would be a mistake to infer from that silence that either all conflicting state regulation is permissible or that all state regulation is preempted. *Id.*

170. *Id.* at 835 (Becker, J., concurring in part and dissenting in part). *See also Danziger*, Nos. 82-5210, 82-5234 and 92-5260, slip op. at 3 (3d Cir. June 30, 1983) (order denying rehearing *en banc*). Judge Arlin Adams in a statement giving his reasons for rejecting an *en banc* rehearing explained that "[t]his appeal presents an extremely important issue concerning the proper balance of state and federal authority over labor unions in the casino industry, an industry which by its very nature must be regulated carefully and perhaps extensively by state governments." *Id.* (Adams, J., statement sur petition for rehearing). For a discussion of the weighing of interests approach, see notes 58-60 and accompanying text *supra*.

171. *See* 709 F.2d at 849-51 (Becker, J., concurring in part and dissenting in part).

172. *See id.* at 846-49 (Becker, J., concurring in part and dissenting in part) (discussing the dangers of criminal infiltration into casino operations).

173. For a discussion of Supreme Court preemption analysis, see notes 45-60 and accompanying text *supra*.